No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF CALIFORNIA
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Petitioner,

v.

KENNETH DUANE ROY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH DUANE ROY *Petitioner-Appellant,*	)	No. 94-15994
v.	)	D.C. No. CV-89-01643-DFL
JAMES GOMEZ; JOHN VAN DE KAMP; and WILLIAM MERKLE, et al., *Respondents-Appellees.*	)	OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
November 30, 1995--San Francisco, California

Filed April 15, 1996

Before: Procter Hug, Jr., Chief Judge, James R. Browning,J. Clifford Wallace, Betty B. Fletcher, Harry Pregerson, Cecil F. Poole, Stephen Reinhardt, Cynthia Holcolmb Hall, David R. Thompson, Pamela Ann Rymer,and Thomas G. Nelson, Circuit Judges

Opinion by Judge Browning; Partial Concurrence and Partial Dissent by Judge Wallace

SUMMARY

Criminal Law and Procedure/Jury Instructions/ Criminal Acts

Sitting en banc, the court of appeals reversed a district court judgment and remanded. The court held that an error in omitting California's specific intent requirement from an aiding and abetting jury instruction could not be deemed harmless, where it could not be said that the jury necessarily found the required intent.

The bodies of James Clark and Archie Mannix were found near a truck. Both were stabbed, and Mannix had drowned. Appellant Kenneth Roy and Jesse McHargue were located nearby, and each had some of Mannix's property in his possession. Roy told police that the killings occurred after a fight involving the four men.

Roy was charged with murder and robbery. A jailhouse informant testified that Roy told him that Roy and McHargue planned to take Clark and Mannix to the country, rob and kill them, and steal the truck. Another jailhouse informant testified that Roy told him that Roy stabbed Clark during a fight, and Roy tried to help McHargue, who was fighting with Mannix. The state took the murder case to the jury on two theories, arguing that Roy was guilty of first-degree murder because the killings were premeditated and were committed during the course of a felony (the robbery of Clark and Mannix).

The jury was given an aiding and abetting instruction that stated that a person aids and abets commission of a crime if, with knowledge of the perpetrator's unlawful purpose, he aids, promotes, encourages or instigates by act or advice the crime's commission.

The jury found Roy guilty of second-degree murder of Clark and made a "special circumstance" finding that Roy used a knife to kill Clark. The jury acquitted Roy of robbing Clark. The jury found Roy guilty of robbery and

first-degree murder of Mannix, with a "special circumstance" finding that Roy had not used a knife to kill Mannix.

After Roy's case was tried, the California Supreme Court held in *People v. Beeman*, 674 P.2d 1318 (Cal. 1984), that an instruction that was identical to the one given in Roy's case was flawed because an aiding and abetting conviction requires proof that the defendant intended to encourage or facilitate the offense with which the principal was charged.

Roy appealed his convictions of robbery and first-degree murder of Mannix. On direct appeal, Roy contended that the state trial court erred in failing to instruct the jury on the specific intent element of aiding and abetting identified in *Beeman*. The California court of appeal concluded that error occurred, but was harmless beyond a reasonable doubt. The California Supreme Court denied relief on collateral review.

Roy filed a federal habeas petition raising the *Beeman* issue. The district court denied the petition, holding that the omission from the instruction of the specific intent requirement was error, but the error was harmless beyond a reasonable doubt. The court determined that no rational juror could find Roy aided McHargue, knowing McHargue's purpose, without also finding Roy intended to aid McHargue in his purpose. A panel of the court of appeals affirmed. En banc review was granted.

[1] Roy's conviction of first-degree murder of Mannix necessarily reflected a conclusion by the jury that Roy was guiltyof felony murder of Mannix in the course of aiding and abetting McHargue's robbery of Mannix.

[2] The Ninth Circuit has held that omission of the specific intent element from jury instructions in a trial on a charge of aiding and abetting under California law deprives the defendant of his constitutional right to have a jury find the existence of each element of the charged offense beyond a reasonable doubt. The Ninth Circuit has also held that *Beeman* error is subject to harmless-error analysis. [3] Failure to mention an element of a crime does not completely remove from the jury's consideration the evidence relating to that element; it simply fails to alert the jurors that they must consider it. Even though an element of the offense is not specifically mentioned, it remains possible that the jury made the necessary finding. The omission is harmless, however, only if review of the facts found by the jury establishes that the jury *necessarily* found the omitted element.

[4] On the record in this case, it was uncertain whether the jury necessarily found beyond a reasonable doubt that Roy intended to facilitate McHargue's robbery of Mannix. Although there was evidence from which a jury could have found that Roy intended to facilitate Mannix's robbery, there were no findings from which it could be concluded that the jury actually did so. [5] Because it could not be said that the jury necessarily found that Roy acted with the intention of assisting McHargue in the robbery of Mannix, the error in the aiding and abetting instruction could not be deemed harmless.

[6] Reversal was required in this case under the relevant line of cases. When a reviewing court is unable to conclude the jury necessarily found an element that was omitted from instructions, it is unable to gauge the effect of the error on the verdict.

Circuit Judge Wallace, with whom Circuit Judges Hall and Rymer joined, concurred and dissented, disagreeing with the majority's method of harmless-error analysis and its conclusion that the error was harmful.

COUNSEL

Hill C. Snellings, Blackmon & Drozd, Sacramento, California, for the petitioner-appellant.

Margaret Venturi, Supervising Deputy Attorney General, Sacramento, California, for the respondents-appellees.

OPINION

BROWNING, Circuit Judge:

This is an appeal from the denial of a petition for habeas corpus. Petitioner Kenneth Duane Roy challenges his state court convictions of robbery and first-degree murder for aiding and abetting a felony murder. He contends the state trial court erred by failing to instruct the jury on the specific intent that is a necessary element of aiding and abetting under California law. The district court agreed, but held the error harmless. A divided panel of this court affirmed. We granted en banc review, and now reverse.

I.

A.

Petitioner Kenneth Duane Roy and his friend Jesse McHargue met Archie Mannix and James Clark outside

a liquor store in Gridley, California. The four began drinking beer. Several hours later, a Gridley police officer saw Mannix's truck narrowly miss a utility pole as it backed up in the store's parking lot. The officer stopped the truck and called another officer to assist. Mannix and Clark were both intoxicated. McHargue and Roy appeared to be sober, but neither had a driver's license. The officers told the men not to drive the truck and left. Two hours later, the truck was gone. The officers found it nose down in a ditch, with the bodies of Clark and Mannix nearby. Both had been stabbed. Mannix, whose body was partially submerged in the ditch, had drowned. Both were partially stripped and their pockets turned out. Mannix's wallet and papers were scattered on the ground. The officers located Roy and McHargue at a nearby restaurant, their clothes wet and muddy. Each was carrying a buck knife. Each had some of Mannix's property in his possession. Roy told police the killings occurred after McHargue lost control of the truck while making a turn, the truck went into the ditch, and Clark became angry and struck Roy. According to Roy, a fight ensued, Roy against Clark and McHargue against Mannix. Roy stabbed Clark and killed him.

Roy was charged with two counts of murder and two counts of robbery. At trial, Marie Smart testified she was driving home when she saw the truck in the ditch and stopped to offer assistance. Two men were standing over Mannix, who was lying on the ground and appeared to be hurt. McHargue told her help had been summoned. A pathologist testified that Mannix's fatal stab wound could have been made by either McHargue's or Roy's knife. Roy's knife bore traces of blood that could have come from either Roy or Mannix but not from Clark.

William Hudspeth, a jailhouse informant, testified Roy told Hudspeth that Roy and McHargue planned to take Clark and Mannix to the country, rob and kill them, and steal the pickup truck. McHargue had trouble subduing Mannix and Roy came to McHargue's aid, pulling Mannix away, stabbing Mannix and holding his head under water until he was dead. According to Hudspeth, Roy and McHargue then took the truck and drove back toward Gridley.

Another jailhouse informant, Sidney Hall, testified Roy told him that after the truck went into the ditch, Clark hit Roy with a stick. A fight followed, and Roy stabbed Clark. Roy saw McHargue was "getting the worst of it" in his fight with Mannix, and "went over to help" McHargue.

The state took the murder case to the jury on two theories, arguing Roy was guilty of first-degree murder (1) because the killings were premeditated and (2) because they were committed during the course of a felony, the robbery of Clark and Mannix. The jury found Roy guilty of second-degree murder of Clark and made a "special circumstance" finding, for purposes of sentencing, that Roy had used a knife to kill Clark. The jury acquitted Roy of robbing Clark. The jury found Roy guilty of robbery and first-degree murder of Mannix, with a "special circumstance" finding that Roy had not used a knife to kill Mannix. Roy challenges his convictions of robbery andfirst-degree murder of Mannix.

B.

[1] The jury's decision to convict Roy of second-degree murder of Clark indicates the jury rejected the state's theory that the defendants planned the crime. The jury also rejected the state's contention that Roy stabbed Mannix by finding Roy did not use a knife against Mannix. Thus Roy's conviction of first-degree murder of Mannix necessarily reflected a conclusion by the jury that Roy was guilty of felony murder of Mannix in the course of aiding and abetting the robbery of Mannix by McHargue.

The jury was given an aiding and abetting instruction which stated that "[a] person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime." This instruction allowed the jury to convict Roy if he provided "knowing aid"--that is, if he knew of McHargue's intention to rob Mannix and took some action that had the effect of furthering the robbery. After Roy's case was tried, the California Supreme Court held in *People v. Beeman*, 674 P.2d 1318 (Cal. 1984), that an instruction identical to the one given in Roy's case was flawed because an aiding and abetting conviction requires proof not merely of "knowing aid" but also that the defendant intended to encourage or facilitate the offense with which the principal was charged.[1]

1. According to *Beeman*, an appropriate aiding and abetting instruction would tell the jury that a person aids and abets the commission of a crime when he, "acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." *Beeman*, 674 P.2d at 1326.

On direct appeal, Roy contended the state trial court erred by failing to instruct the jury on the specific intent element of aiding and abetting identified in *Beeman*. The California court of appeal concluded error had occurred but was harmless beyond a reasonable doubt. The California Supreme Court denied relief on collateral review, and Roy then filed this federal habeas petition raising the *Beeman* issue. In denying the petition, the district court held the omission from the instruction of the specific intent requirement was error, but agreed with the state courts that the error was harmless beyond a reasonable doubt because "[n]o rational juror could find that Roy aided McHargue, knowing what McHargue's purpose was, without also finding that Roy intended to aid McHargue in his purpose." A divided panel of this court affirmed. *Roy v. Gomez*, 55 F.3d 1483 (9th Cir. 1995).

II.

[2] We have held that omission of the specific intent element from jury instructions in the trial of a charge of aiding and abetting under California law deprives the defendant of his constitutional right to have a jury find the existence of each element of the charged offense beyond a reasonable doubt. *Martinez v. Borg*, 937 F.2d 422, 423 (9th Cir. 1991); *see In re Winship*, 397 U.S. 358, 364 (1970) (due process requires proof beyond a reasonable doubt of all elements of the charged offense). We also held in *Martinez* that *Beeman* error is subject to harmless-error analysis. *Martinez*, 937 F.2d at 425. The panel agreed on both points. *Roy*, 55 F.3d at 1485-86.

The panel divided, however, as to whether the error was harmless.

A.

To determine whether the *Beeman* error was harmless, we apply the analysis developed by Justice Scalia in his concurring opinion in *Carella v. California*, 491 U.S. 263 (1989). *See Martinez*, 937 F.2d at 425.[2]

Carella involved a conclusive presumption that relieved the state of its burden of proof with regard to the intent element of embezzlement. Justice Scalia explained that use of such a presumption could be harmless only in the "rare situations" when the reviewing court could be confident that the error played no part in the jury's verdict. *Carella*, 491 U.S. at 270 (Scalia, J., concurring) (quoting *Connecticut v. Johnson*, 460 U.S. 73, 87 (1983)). Stated shortly, such an error is harmless under *Carella* only if no rational jury could find the predicate facts forming the basis for the presumption without also finding the presumed fact. *Carella*, 491 U.S. at 271 (Scalia, J., concurring). In applying *Carella* to an instruction omitting an element of the offense, we have treated the omitted element as the "presumed fact" and considered whether a rational jury could have found the remaining elements of the offense without also finding the omitted element. *Martinez*, 937 F.2d at 424; *see also United States v. Parmelee*, 42 F.3d 387, 393 (7th Cir. 1994).

2. Decisions prior to *Martinez* while not framed in terms of *Carella*, nonetheless applied essentially the same analysis to *Beeman* error. *See Leavitt v. Vasquez*, 875 F.2d 260, 261 (9th Cir. 1989); *Willard v. California*, 812 F.2d 461, 464 (9th Cir. 1987).

Pointing to our recent *en banc* decision in *United States v. Gaudin*, Roy argues we may no longer apply harmless error analysis to *Beeman* error. In *Gaudin*, the district court instructed the jury that an element of the crime was established as a matter of law. We held that "such an error cannot be harmless." *United States v. Gaudin*, 28 F.3d 943, 951 (9th Cir. 1994) (en banc) ("When proof of an element has been completely removed from the jury's determination, there can be no inquiry into what evidence the jury considered to establish that element because the jury was precluded from considering whether the element existed at all."), *aff'd*, 115 S. Ct. 2310 (1995). Relying on this language, some subsequent panel decisions have held omission of an element of a crime from jury instructions requires automatic reversal. *See United States v. Hove*, 52 F.3d 233, 235-36 (9th Cir. 1995); *United States v. Stein*, 37 F.3d 1407, 1410 (9th Cir. 1994).

[3] The error in *Gaudin* differs in a crucial respect from omission of an element of the crime from jury instructions. When a court instructs the jury that an element of the crime has been established as a matter of law, proof of that element of the crime is removed from the jury's purview. Failure to mention an element of the crime, in contrast, does not "completely remove[ ]" from the jury's consideration the evidence relating to that element; it simply fails to alert the jurors they must consider it. *See Gaudin*, 28 F.3d at 951; *United States v. Whitmore*, 24 F.3d 32, 36 (9th Cir. 1994) (omission of knowledge element did not bar jury from considering defendant's mental state); *People v. Dyer*, 45 Cal.3d 26, 64 (Cal. 1988) (*Beeman* error "is not the type of instructional error that wholly prevents the jury from

considering" the defendant's intent).[3] Even though an element of the offense is not specifically mentioned, it remains possible the jury made the necessary finding. Review for harmless error is appropriate, but it is the type of review discussed in *Carella*.[4] That is, the omission is harmless only if review of the facts found by the jury establishes that the jury *necessarily* found the omitted element.[5]

3. To the extent prior cases equate these two distinct situations, such cases are disapproved. *Hove*, 52 F.3d at 235-36 (applying *Gaudin* where judge omitted willfulness element); *Stein*, 37 F.3d at 1410 (applying *Gaudin* where judge omitted knowledge element). *But see Harmon v. Marshall*, 57 F.3d 763 (9th Cir. 1995) (applying *Gaudin* in a "structural error" case where the judge omitted all elements of the charged crime).

4. The instructional error in this case may be described eith er as the omission of an element (specific intent) or as the misdescription of an element (intent). In fact, we have sometimes characterized a *Beeman* error as omission of an element, *see Martinez*, 937 F.2d at 424-25 (9th Cir. 1991), and sometimes as the misdescription of an element, *see Hart v. Stagner*, 935 F.2d 1007, 1012 (9th Cir. 1991). Whether we characterize the error as an omission or misdescription of an element, we must still apply *Carella* harmless error analysis. *See Carella*, 491 U.S. at 270 (Scalia, J., concurring) ("[M]isdescription of an element of the offense . . . deprives the jury of its factfinding role, and must be analyzed similarly [to a conclusive presumption]").

5. Refusal to impose a rule of per se reversal comports with earlier holdings that omission of an element is harmless if the element is not at issue in the case, *see Hart*, 935 F.2d at 1012-13, or if convictions on other counts establish the missing element. *See United States v. Williams*, 935 F.2d 1531, 1536 (8th Cir. 1991) (omission of intent element from one count harmless where intent was defined elsewhere in jury instructions).

B.

[4] On the record in this case, we cannot be certain the jury necessarily found beyond a reasonable doubt that Roy intended to facilitate McHargue's robbery of Mannix, as required under *Carella* and *Martinez* before the instructional error can be treated as harmless. See *Carella*, 491 U.S. at 271; *Martinez*, 937 F.2d at 425 ("The error is harmless if no rational jury would have made these findings without also finding that appellant had the specific intent to aid" the principal's crime). Although there was evidence from which a jury *could have* found that Roy intended to facilitate Mannix's robbery, there were no findings from which we could conclude the jury actually did so.

The testimony of the two jail informers, Hudspeth and Hall, indicates Roy realized McHargue was "getting the worst of it" in his fight with Mannix, and went to McHargue's assistance. From this evidence, the jury could have found Roy's intent was not to help McHargue rob Mannix but to prevent Mannix from defeating McHargue. Alternately, the jury could have found that although Roy realized McHargue was trying to rob Mannix, and in fact aided McHargue by keeping Clark from going to Mannix's aid, Roy did not intend that result.[6]

[5] It was for the jury, not the judges who have reviewed the case, to determine which interpretation of

6. Roy suggested other plausible alternative findings we need not set out here.

the evidence was correct. We are not free to evaluate the evidence and postulate what the jury would have found had it been properly instructed. "[T]he question is not whether guilt may be spelt out of a record, but whether guilt *has been found by a jury* according to the procedure and standards appropriate for criminal trials." *Carella*, 491 U.S. at 269 (Scalia, J., concurring) (emphasis added) (quoting *Bollenbach v. United States*, 326 U.S. 607, 614 (1946). Because we cannot say the jury necessarily found Roy acted with the intention of assisting McHargue in the robbery of Mannix, the error in the aiding and abetting instruction cannot be deemed harmless.[7]

C.

The state argues relief is not warranted because Roy has not shown the error had a substantial or injurious effect on the jury's verdict, as required when the error is raised in collateral proceedings. See *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). We disagree.

On direct appeal, relief is granted for constitutional error unless the state demonstrates the error was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18,
24 (1967). As Justice Scalia said in *Carella*, the *Chapman* test

7. The state court's determination that the error was harmless does not affect our analysis. Whether an error is harmless is not a factual determination entitled to the statutory presumption of correctness under 28 U.S.C. § 2254(d). *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995). We review de novo the district court's determination that the erroneous instruction was harmless error. *Id.*; *see Calderon v. Prunty*, 59 F.3d 1005, 1008 (9th Cir. 1995).

can be met only if the reviewing court can tell what the jury
actually found, since only then can the court conclude "'beyond a reasonable doubt,' *Chapman v. California*, 386 U.S. 18, 24 (1967), that the jury found the facts necessary to support the conviction." *Carella*, 491 U.S. at 271. The *Chapman* standard is inapplicable on collateral review, however. In *Brecht*, the Court adopted a stricter standard for harmless error in habeas cases, holding relief is warranted on collateral attack only if the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 113 S. Ct. at 1714 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see Hegler v. Borg*, 50 F.3d 1472, 1477 (9th Cir. 1995). More recently, the Supreme Court has held relief is also appropriate if the record on collateral review leaves the judge in "grave doubt" as to the effect of the constitutional error. *See O'Neal v. McAninch*, 115 S. Ct. 992, 994-95 (1995). Relief was granted in *O'Neal* because the record was "so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of the error." *O'Neal*, 115 S. Ct. at 995. In such circumstances, "the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (i.e., as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')." *Id.* at 994.

[6] We are unable to conclude under *Carella* that the jury necessarily found the missing element; if this case were before us on direct review, the error would not be harmless beyond a reasonable doubt, our analysis would be at an end, and we would be required to reverse the conviction. Because this case reaches us on habeas, however, we must determine whether reversal is required under the *Brecht/O'Neal* line of cases. We believe it is. When the reviewing court is unable to conclude the jury

necessarily found an element that was omitted from the instructions, it is unable to gauge the effect of the error on the jury's verdict. In this situation, a conscientious judge can only be "in grave doubt as to the harmlessness of the error," *O'Neal*, 115 S. Ct. at 995, and relief must be granted.

III.

Roy's due process rights were violated when he was convicted under an aiding and abetting instruction that omitted California's requirement that the defendant have the specific intent to assist in the commission of the crime. Because a rational jury could have found Roy's actions had the effect of assisting McHargue in the robbery of Mannix, but Roy did not intend his actions to have that effect, we are unable to say the jury *necessarily found* the required intent. Under *Carella*, *Brecht*, and *O'Neal*, we cannot say the violation of Roy's due process rights was harmless error.

REVERSED and REMANDED.

WALLACE, Circuit Judge, with whom Circuit Judges Hall and Rymer join, concurring and dissenting:

I agree with the majority that omitting or misdescribing an element of an offense is subject to harmless-error review. However, I cannot agree either with the method of harmless-error analysis the majority employs or with its conclusion that the error was harmful. I respectfully dissent.

I

The majority holds that whenever a jury instruction contains an element that has been misdescribed or omitted and the jury did not actually find the facts supporting the missing element, a judge can never know whether the error had a "substantial and injurious effect or influence in determining the jury's verdict" as required by *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1714 (1993) (*Brecht*) (internal quotation omitted). *See* maj. op. at 4687. By equating error under *Carella v. California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring) (*Carella* concurrence), with error under *Brecht*, the majority pays lip-service to the exclusive, less onerous, standard that the Court in *Brecht* said we should apply to trial errors when our review is collateral. I believe the majority erroneously looks to the *Carella* concurrence for the standard of review in habeas corpus cases, and that its error is compounded by its misapplication of *Brecht* and *O'Neal v. McAninch*, 115 S. Ct. 992, 995 (1995) (*O'Neal*).

I agree with the majority that *Brecht*'s less onerous standard completely supplants *Chapman*'s harmless-error test when we review collaterally. Maj. op. at 4688; *Brecht*, 113 S. Ct. at 1721-22. I also agree that the *Carella* concurrence explained how the *Chapman* harmless-error test is to be applied on direct appeal when the error involves a jury instruction. Maj. op. at 4688-89. But from these two premises I conclude that because *Carella* was derived from *Chapman*, *Brecht* must supplant *Carella* when we review a jury instruction error collaterally.

Brecht explicitly requires us to apply its standard of review to determine "whether habeas relief must be granted because of constitutional error of the trial type." *Brecht*, 113 S. Ct. at 1722; *see also id.* at 1729 (O'Connor,

J. dissenting) (Court's holding applies "to *any* trial error asserted on habeas"); *O'Neal*, 115 S. Ct. at 994 (*Brecht* "sets forth the standard normally applied by a federal habeas court in deciding whether or not . . . constitutional 'trial' error is harmless"). Misdescription of an element of an offense is trial error. *See Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991) (jury instruction containing an unconstitutional conclusive presumption is trial error). We should therefore apply *Brecht* -- and *Brecht* alone -- to determine whether the *Beeman* error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 113 S. Ct. at 1714 (internal quotation omitted).

We must also apply *Brecht* rather than the *Carella* concurrence because doing so would be faithful to the Court's insistence that a "less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence." *Id.* at 1714. Yet by effectively choosing to apply the *Carella* concurrence instead of *Brecht*, the majority implicitly engages in a balancing that the Court has already done. *Brecht* already balanced the stricter *Chapman* harmless-error standard against policies discouraging habeas corpus relief and concluded that a standard less onerous than *Chapman* was more appropriate in all habeas corpus cases involving trial error. The result of *Brecht*'s balance is clear: providing "habeas relief merely because there is a reasonable possibility that trial error contributed to the verdict is at odds with the historic meaning of habeas corpus -- to afford relief to those whom society has grievously wronged." *Id.* at 1721 (citations and internal quotations omitted). At the very least, *Brecht* requires a reviewing court to ask whether a petitioner suffered "actual prejudice." *Id.* at 1722.

The strict *Carella* concurrence standard, of course, asks not whether there is a "reasonable probability that trial error contributed to the verdict," but whether a rational jury necessarily found certain facts. The *Carella* concurrence explained that *Chapman*'s "harmless beyond a reasonable doubt" standard may not substitute a judge's findings for a rational jury's findings. Under the *Carella* concurrence, an error may be harmful on direct review even if there is a reasonable probability, or a strong probability, or a near-certain probability that the error had absolutely no effect on the outcome. But the Supreme Court has told us that in these situations we may not disturb state convictions collaterally. Simply put, I would not hold, as the majority does, that "society has grievously wronged" every habeas corpus petitioner whose trial contains error that is harmful under the *Carella* concurrence.

I have even more difficulty following the majority's attempt to blend *Carella*, *Brecht*, and *O'Neal*. *See* maj. op. at 4688-89. By first applying the stricter approach in *Carella*, the opinion eliminates the effect of *Brecht*'s "less onerous standard" of review. *Brecht*, 113 S. Ct. at 1721-22. *Brecht* requires the reviewing court to determine whether the error had a substantial or injurious effect on the outcome. *Brecht* also requires such a court to review the record in order to determine an error's effect. The *Carella* concurrence, of course, does not permit this thorough review of the record. Thus, if the majority actually were "to determine whether reversal is required under the *Brecht/O'Neal*" line of cases, maj. op. at 4689, it must thoroughly review the record. Instead, the majority applies only the *Carella* concurrence, limiting inquiry to whether the jury necessarily found the uninstructed element. The majority insists that in every case in which a jury has not actually found the missing

element, a reviewing court is never able to determine whether the instruction error had a substantial and injurious effect. Maj. op. at 4689. Clearly, a judge's ability to determine an error's effect is foreclosed unless the judge thoroughly reviews each case's record with its individual circumstances. This is what Brecht requires. This is what the majority rejects.

I cannot understand how we can know that the "unusual" and "narrow" circumstance in *O'Neal*, 115 S. Ct. at 994, 995 -- which occurs when a judge is in *grave doubt* as to whether an error had a substantial and injurious effect -- will *always* exist when jury instructions are harmful under the *Carella* concurrence. A judge need only reach the "grave doubt" issue in *O'Neal after* being unable to decide whether an error had a substantial and injurious effect. Id. at 994. The majority holds that in every case involving a jury instruction not satisfying the *Carella* concurrence, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id*. But *O'Neal* requires each individual judge reviewing a habeas petition to ask, "Do I, the judge, think that the error substantially influenced the jury's decision?" *Id*. at 995. The majority mandates the answer to that question for every judge in our circuit. Maj. op. at 4689.

In addition, the majority creates intercircuit conflict by refusing to apply *Brecht* instead of the *Carella* concurrence when reviewing collaterally jury instruction errors. *See Libby v. Duval*, 19 F.3d 733, 739-40 (1st Cir.) (holding that *Brecht*'s record-review applies to instructional errors reviewed on habeas corpus and that *Carella* was inapplicable in the habeas corpus context), *cert. denied*, 115 S. Ct. 314 (1994); *Cuevas v. Washington*,

36 F.3d 612, 620 & n.17 (7th Cir. 1994) (applying *Brecht* to instruction error on habeas corpus review).

II

I would therefore apply the standard set forth in *Brecht* and ask whether the district court's failure to include specific intent in the aiding and abetting robbery jury instruction had a substantial and injurious effect on the jury's verdict. The majority searched the record and contends that a rational jury could have found that Roy assisted McHargue in the robbery of Mannix, but also could have found that Roy did not intend his actions to have that effect. Maj. op. at 4687, 4689-90. However, given the evidence that the jury actually heard, this latter possibility does not establish the substantial and injurious effect that *Brecht* requires.

The jury found Roy guilty of second degree murder of Clark, guilty of aiding and abetting the robbery of Mannix by McHargue, and guilty of the felony murder of Mannix, with robbery as the underlying felony. The aiding and abetting instruction actually given required the jury to find that Roy aided in the commission of the robbery offense by McHargue. The instruction also required the jury to find that when Roy provided this aid, he did so with the actual knowledge of McHargue's unlawful purpose. Given what the jury actually found and the evidence in the record supporting Roy's specific intent to further the robbery, I would hold the *Beeman* error harmless under *Brecht*. The error did not have a substantial and injurious effect on the jury's verdict.

I certainly do not have the grave doubt that the majority holds I necessarily must. Roy admitted stabbing Clark. Mannix's shirtless body was found submerged in

water under his truck. Mannix died either from being stabbed or drowned. Mannix's wallet was found with one dollar in it. Upon his arrest, Roy's pants were wet from the calf down. Police found $170 and Mannix's wristwatch among Roy's possessions. Roy told Hall that he "helped" McHargue when McHargue and Mannix were fighting. Hudspeth testified that Roy admitted a plan to rob Clark and Mannix and admitted robbing both. Hall testified that Roy admitted helping McHargue with Mannix. From this I would conclude that there is not even a reasonable probability that Roy did not assist McHargue with the intent to further the robbery of Mannix. Therefore, Roy's habeas corpus petition should be denied.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH DUANE ROY Petitioner-Appellant, v. JAMES GOMEZ; JOHN VAN DE KAMP; and WILLIAM MERKLE, et al., Respondents-Appellees.	)	No. 94-15994 D.C. No. CV-89-01643-DFL ORDER

Filed September 26, 1995

Before: WALLACE, Chief Judge.

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH DUANE ROY *Petitioner-Appellant,*	)	No. 94-15994
v.	)	D.C. No. CV-89-01643-DFL
JAMES GOMEZ; JOHN VAN DE KAMP; and WILLIAM MERKLE, et al., *Respondents-Appellees.*	)	OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
April 14, 1995--San Francisco, California

Filed June 9, 1995

Before: Floyd R. Gibson*, Alfred T. Goodwin and
Procter Hug, Jr., Circuit Judges
Opinion by Judge Goodwin; Dissent by Judge Hug

SUMMARY

Criminal Law and Procedure/Defendants and Accused, Rights of/Jury Instructions

The court of appeals affirmed a district court judgment. The court held that the district court did not err in finding that an error in instructing a jury on the

*Honorable Floyd R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

intent requirement for aiding and abetting was harmless beyond a reasonable doubt.

After the bodies of Archie Mannix and James Clark were found, appellant Kenneth Roy and Jesse McHargue consented to a search of their backpacks. McHargue's pack yielded Mannix's moccasins and his vest. A search of Roy produced a watch later identified as having belonged to Mannix, Roy was charged with two counts of robbery and two counts of first degree murder.

At trial, Roy did not testify, but the jury heard testimony from two jailmates who swore Roy had told them of his participation in the killing of Clark and Mannix. The state's case was structured on two theories to support first degree murder: premeditation and felony murder. Roy's counsel put on expert evidence in an effort to prove that Roy's mental capacity was impaired. This evidence was introduced to show the jury that Roy was unable to form any intent at all. The state put on evidence to the contrary.

The jury found Roy guilty of second degree murder for killing Clark, but found him not guilty of robbing Clark. The jury answered a special verdict "no" on the question whether Roy used his knife, but found him guilty of first degree murder in the killing of Mannix.

In instructing the jury, the trial court committed a *Beeman* error by failing to tell the jury that an aider and abettor (Roy), must not only know the unlawful purpose of the accomplice (McHargue), but must *intend* to encourage or facilitate the commission of the offense--in this case the robbery of Mannix. On direct appeal, the California court of appeal affirmed the felony murder verdict on the theory of aiding and abetting in the

robbery of Mannix. The court found that the *Beeman* error was harmless beyond a reasonable doubt, and the state supreme court denied post conviction relief.

Roy petitioned for a writ of habeas corpus in the district court. The court found the *Beeman* error harmless beyond a reasonable doubt. Roy appealed the denial of his habeas petition, contending that because the trial court's instruction did not conform to the requirement of *People v. Beeman*, the jury was permitted to convict him without finding an element of the crime.

[1] In this case, the only rational way the jury could have found Roy guilty on a felony murder theory was by making a preliminary predicate factual finding that Roy intended to help McHargue rob Mannix, while knowing that McHargue intended to rob Mannix. [2] Whether or not the *Beeman* instruction had been given, on the evidence in this case, no jury could fail to find that Roy intended to aid McHargue in subduing and robbing Mannix. There was no other rational explanation of the physical evidence and the testimony about Roy's admitted participation in the robberies and murders that could be consistent with the verdict. [3] The only rational route which the jury could have followed to reach the verdict it reached in this case had to include the implicit finding that Roy intended to help McHargue, knowing McHargue's purpose. That verdict was supported by evidence and was completely rational.

Circuit Judge Hug dissented, noting that the jury did not find that Roy intended to aid in the robbery.

COUNSEL

Hill C. Snellings, Blackmon & Drozd, Sacramento, California, for the petitioner-appellant.

Margaret Venturi, Deputy Attorney General, Sacramento, California for the respondents-appellees.

OPINION

GOODWIN, Circuit Judge:

Kenneth Duane Roy appeals the denial of his habeas corpus petition challenging his 1983 California conviction for first degree murder and robbery. Roy's principal point on appeal is that because the Superior Court's instruction did not conform to the requirements of *People v. Beeman*, 35 Cal. 3d 547 (1984), the jury was permitted to convict him without finding an element of the crime. *Carella v. California*, 491 U.S. 376 (1989) (Justice Scalia concurring).

FACTS

On September 13, 1981, Kenneth Roy and one Jesse McHargue, while hitch hiking near Gridley, California, met Archie Mannix and James Clark outside a liquor store and began drinking beer with them. A Gridley police officer observed the foursome in a pickup truck. The officer stopped the truck and advised the four not to drive.

Sometime after midnight, officers came upon the pickup truck nose down in a ditch. The bodies of Clark and Mannix were found. The bodies showed signs of stabbing. Mannix's body was partly submerged in the ditch water under the truck. His body later revealed evidence of drowning. Both bodies showed signs of having been stripped of clothing, and such clothing as was found showed the pockets turned out. Blood was found on bushes, and papers, not otherwise described, were found scattered near the truck. Roy and McHargue were not present, but were found about 3 a.m. in a nearby restaurant. Both men were wearing wet and muddy clothing.

Roy and McHargue were informed of their Miranda rights and consented to a search of their backpacks. McHargue's pack yielded Mannix's wet moccasins and his vest. After the two men were arrested, a search of Roy produced a Buck knife, $ 170.52 in cash, and a watch later identified as having belonged to Mannix. Roy was charged with two counts of robbery and two counts of first degree murder.

At trial, Roy did not testify, but the jury heard testimony from two jail inmates who swore Roy had told them of his participation in the killing of Clark and Mannix.

The state's case was structured on two theories to support first degree murder: premeditation and felony murder. The prosecutor argued that Roy and McHargue planned to drive to a remote location, rob and kill both victims, and steal their pickup truck. The prosecution argued that the physical evidence, the testimonial evidence that the victims had money and the defendants had none, and the testimony about admissions Roy

allegedly made to jailed informers proved that Roy killed Clark while McHargue was struggling with Mannix, and that after Roy had killed Clark, Roy helped McHargue rob and kill Mannix. The evidence was sufficient to take both theories to the jury. The state also sought a verdict of special circumstances, based on the use of knives in the stabbing deaths of the two victims, but this issue was eliminated in state court proceedings.

The jury found Roy guilty of second degree murder for killing Clark, but found him not guilty of robbing Clark. The jury answered a special verdict "no" on the question whether Roy used his knife, but found him guilty of first degree murder in the killing of Mannix.

Roy now argues, and we agree, that the verdict of second degree murder of Clark eliminates the theory of premeditation in Roy's conviction of first-degree murder. The validity of Roy's first degree murder conviction in the killing of Mannix thus depends on felony murder in the course of aiding and abetting the robbing of Mannix.

INSTRUCTIONS

The trial court instructed the jury orally and in writing,[1] *inter alia*, "[t]o find that the special circumstance, referred to in these instructions as murder in the commission of robbery, is true, it must be proved: [1] That the murder was committed while the defendant was engaged in or was an accomplice in the commission of a robbery. [2] That the murder was committed in order to carry out or advance the commission of the

1. The appeal has not challenged minor differences between instructions as read to the jury and those sent into the jury room in written form.

crime of robbery. . . . In other words, the special circumstance referred to. . .is not established if the. . .robbery was merely incidental to the commission of the murder."

The jury was also instructed "if a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all persons who. . .with knowledge of the unlawful purpose of the perpetrator of the crime aid. . .its commission, are guilty of murder of the first degree, whether the killing is intentional, or accidental." CALJIC No. 8.27 (1979).

The jury was further instructed that one "who aids and abets is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged." CALJIC No. 300 as amended by CALJIC No. 4.25.

CALJIC No. 301 as given, reads: "A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime."

The *Beeman* error in the above instruction consisted in the failure of the court to tell the jury that an aider and abettor (Roy) must not only know the unlawful purpose of the accomplice (McHargue), but must *intend* to encourage or facilitate the commission of the offense--in this case the robbery of Mannix. *See Beeman*, 35 Cal. 3d at 561. (*Beeman* had not been decided when the case was tried.)

On direct appeal, the California court of appeal affirmed the felony murder verdict on the theory of aiding and abetting in the robbery of Mannix. The court of appeal found the *Beeman* error harmless beyond a reasonable doubt, and the state supreme court denied post conviction relief in 1989.

The petition for habeas corpus in the district court followed. The district court again found the *Beeman* error harmless beyond a reasonable doubt, saying: "No rational juror could find that Roy aided McHargue, knowing what McHargue's purpose was, without also finding that Roy intended to aid McHargue in his purpose." We agree.

DISCUSSION

The appeal advances the argument that because no *Beeman* instruction was given on intent, an essential element of the crime, *Carella*, requires a new trial. We have in the § 2254 cases collected in *Martinez v. Borg*, 937 F.2d 422, 424 (9th Cir. 1991), refused to find the *Beeman* error harmless beyond a reasonable doubt. But the teaching of the *Carella* line of cases tells us to look to what the jury actually decided, not what we, as judges, believe the jury would have decided if they had been properly instructed. We have held that if jury instructions omit an element of the offense, (in this case, specific intent) constitutional error results. *See Martinez*.

[1] If the jury returned a verdict from which it could be said that the jury actually made the essential predicate fact finding, then we affirm. Here, the only rational way the jury could have found Roy guilty on a felony murder theory was by making a preliminary predicate factual finding that Roy intended to help McHargue rob Mannix, while knowing that McHargue

intended to rob Mannix. It is therefore necessary for us to review the record, the instructions as a whole, and the verdict, to determine whether the jury, despite the incomplete instruction, had to find every material element of the offense in order to return the verdict it returned.

Roy argues the jury could have found that he knew McHargue intended to rob Mannix and helped him do so without necessarily finding that Roy intended to assist in the robbery. Roy, as noted, did not testify. His counsel put on expert evidence in an effort to prove that Roy's mental capacity was impaired by intoxication, as well as by his inherent immaturity and lack of mental acuity. This evidence was introduced to show the jury that Roy was unable to form any intent at all, much less an intent to help McHargue rob Mannix. The state put on evidence to the contrary. The jury was entitled to disbelieve Roy's experts.

[2] Whether or not the *Beeman* instruction had been given, on the evidence in this case, no jury could fail to find that Roy intended to aid McHargue in subduing and robbing Mannix.[2] There was no other rational explanation of the physical evidence and the testimony about Roy's admitted participation in the robberies and murders that could be consistent with the verdict.

[3] Hypothetical and imaginary scenarios perhaps may be contrived to suggest that Roy did not intend to help

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2. It was not necessary that the jury find that Roy intended to help McHargue kill Mannix. Such a finding could have found support in the evidence, but was not requested, because aiding in the robbery of Mannix which resulted in his death was a sufficient finding to support Roy's felony murder verdict.

McHargue rob Mannix. But the jury had before it the defense evidence that attempted to cast doubt on Roy's capacity to form any intent, criminal or otherwise, and the jury obviously did not believe that evidence. We conclude, as did the California courts and the District Court, that the only rational route which the jury could have followed to reach the verdict it reached in this case had to include the implicit finding that Roy intended to help McHargue, knowing McHargue's purpose. That verdict was supported by evidence, and was completely rational. *Hegler v. Borg*, 1995 U.S. App. Lexis 6113 (quoting *O'Neal v. McAninch*, 115 S. Ct. 992, 995 (1995), "Only if the record demonstrates the jury's decision was substantially influenced by the trial error or there is '"grave doubt" about whether an error affected a jury in this way' will [Roy] be entitled to habeas relief.").

AFFIRMED

HUG, Circuit Judge, Dissenting:

The majority recognizes that under Supreme Court and Ninth Circuit precedent we must only look to what the jury *actually decided* in determining an essential element of a crime not what we as judges *believe the jury would have decided* if it had been properly instructed. *See Carella v. California*, 491 U.S. 263, 268-69 (1989) (Scalia, J., concurring); *Yates v. Evatt*, 500 U.S. 391, 404 (1991); *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2082 (1993); *Martinez v. Borg*, 937 F.2d 422, 424 (9th Cir. 1991). However, the majority fails to apply that law to this case.

The majority acknowledges that there was a "*Beeman*" error in the trial court's failure to instruct the jury that,

in order to find Roy guilty of aiding and abetting the robbery of Mannix, it must find that Roy *intended* to encourage or facilitate the robbery. Although there clearly is evidence from which a jury *could have* found the requisite intent, there is no way we can say that the jury *did* find that intent. There is no "predicate" finding from which we can say that the jury actually *found* the requisite intent, as the majority indicates.

The majority simply weighs the evidence and substitutes its judgment because it finds the other possibilities "fanciful." This is the very type of harmless error analysis that is foreclosed by *Carella*, *Yates*, *Sullivan*, and *Martinez*.

From the evidence at trial, it was quite possible the jury could have found that Roy's intent in coming to McHargue's aid in the fight with Mannix was to save McHargue from being killed, not to aid in a robbery. Or the jury could have found, among other possibilities, that by fighting with Clark, Roy in fact aided McHargue in a robbery without intending his fight with Clark to have such an effect. Or the jury simply could have found that Roy did not intend to aid in the robbery for whatever reason. The point is the jury did not make the finding, and we as appellate judges cannot supply our finding on an essential element of the crime for one the jury did not make.

A jury finding that Roy intended to aid in the robbery was a necessary finding of an essential element of the charged crime of felony first degree murder. The jury did not make this finding. This error cannot be harmless. I would grant this petition for habeas corpus on the first degree murder conviction for the murder of McHargue. This, of course, would not affect Roy's conviction of

second degree murder for the murder of Clark.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY, **Petitioner,** **v.** **JAMES GOMEZ, et al.,** **Respondents.**	Civ. S-89-1643-DFL-PAN O R D E R

Petitioner Kenneth D. Roy, a state prisoner represented by counsel, seeks a writ of habeas corpus under 28 U.S.C. § 2254. The magistrate judge issued findings and recommendations on March 5, 1993, recommending that the petition be denied. The court heard oral argument on July 30, 1993, on petitioner's objections to the findings and recommendations. The court has deferred rendering a decision in this case

because of the grant of en banc hearing in United States v. Gaudin, 997 F.2d 1267, en banc review granted, 5 F.3d 374 (9th Cir. 1993), a case on which petitioner places some considerable reliance. No decision has been forthcoming in Gaudin, however, and it appears unwise to defer decision any further in this case.[1]

The facts of the case are well stated in the findings and recommendations. Roy contends that the aiding and abetting instruction given at trial was defective under People v. Beeman, 35 Cal.3d 547 (1984), which was decided after Roy's trial but before his conviction became final. In Beeman, the California Supreme Court found that the aiding and abetting instruction in CALJIC No. 3.01--which was the

1. If the en banc court finds that harmless error analysis may be applied then Gaudin will provide no support for petitioner. On the other hand, if the en banc court accepts the approach of the panel in Gaudin, the decision is not likely to address cases involving the court of instruction error alleged here.

instruction given by the trial court here[2]--was adequate because it did not expressly instruct the jury that an aider and abettor must have the intent to encourage or facilitate the commission of the offense. The court suggested that an appropriate aiding and abetting instruction would include an additional clause on intent:

> a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by actor advice aids, promotes, encourages or instigates, the commission of the crime.

Id. at 561 (emphasis added).

Following state court precedents subsequent to Beeman, the court of appeal found that the

2. The jury was instructed that "[a] person aids and abets the commission of a crime if with [1] knowledge of the unlawful purpose of the perpetrator of the crime he [2] aids, promotes, encourages or instigates by act or advice the commission of such crime." Findings and recommendations at 11.

"instruction found wanting in Beeman (CALJIC No. 3.01 [1980]) and given here, may convey the required intent to the jury because in the circumstances of the case it contains a legally adequate criterion of intent." People v. Roy, No. C000992, slip. op. at 25 (Cal. Ct. App. January 27, 1989) ("Roy II"). The court reasoned that if the defendant did not intend his actions or if the defendant, intending his actions, did not know that his acts would aid the principal, then the failure to include an instruction as required by Beeman would be fatal. Absent such circumstances, however, it was adequate if the jury were instructed that it must find that the defendant acted with knowledge of the principal's unlawful purpose and provided aid or encouragement to commit the offense. Id. at 26-28. After reviewing all of the different possible factual circumstances under which the jury could have convicted Roy, the court of appeal found

no circumstance in which the challenged instruction could have prejudiced the defendant.[3]

In habeas corpus cases involving Beeman error, the Ninth Circuit uses and approach similar to that used by the California court of appeal here. In Willard v. California, 812 F.2d 461 (9th Cir. 1987), the court found that the absence of an instruction on specific intent was harmless beyond a reasonable doubt because intent was not at issue in the case, and the jury could not have convicted "without also finding that [defendant] had the requisite intent." Id. at 465. In Leavitt v. Vasquez, 875 F.2d 260 (9th Cir. 1989), the court followed Willard by applying harmless error analysis and used the test for harmless error suggested

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3. "Under the circumstances of this case, the assistance to McHargue by defendant in the perpetration of the robbery, with defendant's knowledge of McHargue's purpose, unambiguously reveals defendant's awareness of the importance of his acts in advancing the robbery. In the absence of evidence establishing some contrary intent, no other inference is permissible from that act." Roy II, at 30.

by Justice Scalia's concurring opinion in Carella v. California, 491 U.S. 263, 109, S. Ct. 2419 (1989).

Under the Scalia test, harmless error may be found:

> When the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings functionally equivalent to finding the element required to be presumed.

Id. at 2423. The Willard court held that in the particular circumstances of the case the jury's finding that the defendant gave aid with knowledge of the principal's criminal purpose was the functional equivalent of finding that defendant acted with the requisite specific intent to facilitate the principal's crime.

In Martinez v. Borg, 937 F.2d 422 (9th Cir. 1991), the court again used the harmless error analysis suggested by Justice Scalia:

> In applying the Scalia test to this case, we examine the findings made by the jury. The error is harmless if no rational jury would have made these findings without also finding that [petitioner] had the specific intent to aid the murder and attempted murder.

Id. at 425. The court found that the Beeman error was not harmless in this case because there was evidence at trial that the defendant did not have the specific intent to aid the commission of the offense. The court's analysis of the evidence also suggested that the jury could have convicted without finding that when Martinez assisted the principal he understood the principal's criminal purpose.[4]

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4. The opinion in Martinez does not quote the aiding and abetting instruction that was given. However, the description of the instruction suggests that it did not require--as the instruction did here--that the jury must find that the defendant acted to aid the offense with knowledge of the principal's unlawful purpose. See Martinez, 937 F.2d at 425 ("The jury instruction required the jury to find only that appellant knew the perpetrator's criminal purpose and that appellant did some act of aiding, abetting, or encouraging in the commission of the offense."). This omission from the instruction is critical and would explain the court's analysis of the evidence in Martinez.

Finally, in Hart v. Stagner, 935 F.2d 1007 (9th Cir. 1991), the court again looked to "the predicate facts the jury must have found to convict [the defendant] under the instructions it was given" and then determined whether "the jury must have necessarily found the element on which the jury instructions were incorrect." Id. at 1012. In view of the facts of the case, the court concluded that no rational jury could have found that defendant knew of the principal's criminal purpose but acted without an intent to aid in the commission of the crime. Id. The court noted that the defense at trial was not one of lack of intent. Id. at 1013.

The jury in this case found Roy guilty of second degree murder of Clark, guilty of aiding and abetting the robbery of Mannix by McHargue, and guilty of the felony murder of Mannix, with robbery as the underlying felony. The aiding and abetting instruction

actually given required that the jury find that Roy aided in the commission of the robbery offense and that when he provided this aid he did so with knowledge of McHargue's unlawful purpose. As both the magistrate judge and court of appeal have explained in some detail, the jury's findings that Roy assisted McHargue's robbery of Mannix knowing McHargue's purpose are the functional equivalent of a finding of specific intent. No rational juror could find that Roy aided McHargue, knowing what McHargue's purpose was, without also finding that Roy intended to aid McHargue in his purpose. This kind of "knowing aid," in the language of the court of appeals, is synonymous with specific intent, at least when there is no contrary evidence suggesting that the acts were involuntary or that specific intent was otherwise lacking. Here Roy did not argue that he lacked the intent to aid McHargue except to the extent that he

contended that because of diminished capacity he lacked the ability to form intent, a contention rejected by the jury in its conviction of Roy for the murder of Clark. The factual scenarios suggested by petitioner in which he may have assisted McHargue to rob Mannix, without intending to do so, ignore that the jury was required to find that when Roy acted to give aid to McHargue, he did so with knowledge of McHargue's unlawful purpose. This case is not fairly distinguishable from Leavitt, Willard, and Hart. The Beeman error that occurred here was harmless beyond a reasonable doubt.

Petitioner also argues that the harmless error approach is itself error because the removal of an element from the jury's consideration can never be harmless but amounts to an impermissible directed verdict for the state. As the discussion above demonstrates, it is well established that claims of

Beeman error are evaluated under a harmless error standard. The court in United States v. Gaudin, 997 F.2d 1267 (9th Cir. 1993), does not purport to alter this approach In Gaudin the district court erroneously removed the question of materiality from the jury by instructing it that the alleged false statements were material as a matter of law. The court found that harmless error analysis could not be applied in this circumstance because the element of materiality had been "completely removed" from the jury's consideration. Id. at 1272. In these circumstances, unlike Martinez and Justice Scalia's approach, "there can be no inquiry into what evidence the jury considered to establish that element, because the jury was precluded from considering the element at all." Id. By contrast, here intent was not completely removed from the jury's consideration. Rather, the jury was not instructed, or was imperfectly instructed,

on intent to aid and abet.[5] For these reasons, Gaudin does not apply here. Moreover, Gaudin does not question the continued use of the well established harmless error analysis in cases involving Beeman error. Indeed, Gaudin expressly relies upon Martinez. See also Hennessy v. Goldsmith, 929 F.2d 511 (9th Cir. 1991).

Nor does Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), suggest that harmless error review should not apply to the instructional error here. In Sullivan the Court reaffirmed the appropriateness of such review to cases involving instructions incorporating mandatory presumptions. Beeman error is a similar kind of error because the jury finds--or is presumed to find--the requisite intent by finding knowing aid. The Court

5. As suggested by the court of appeal in its decision, the instruction that was given, requiring a finding of "knowing aid," is a sufficient implicit instruction on the requisite intent in the circumstances. In this sense, the element of intent was presented to the jury for consideration without the word "intent."

reaffirmed that when the jury finds facts "so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact" then harmless error may be found because "the presumption played no significant role in the finding of guilt beyond a reasonable doubt." Id. at 2082. However, when as in Sullivan, the reasonable doubt instruction is defective, such that all of the jury's fact findings are unreliable, there can be no harmless error analysis because there are no jury findings from which to ask what further a reasonable jury must find. Sullivan has no bearing on the continued use of harmless error analysis to cases involving Beeman error. If anything, it affirms the continued validity of that approach.

The court adopts the findings and recommendations submitted by the magistrate judge

and reject petitioner's objections. The petition for habeas corpus is DENIED.

IT IS SO ORDERED.

Dated: 9 May 1994.

/s/
DAVID F. LEVI
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY, **Petitioner,** **v.** **JAMES GOMEZ, et al.,** **Respondents.**	Civ. S-89-1643-DFL-PAN FINDINGS AND RECOMMENDATIONS

Petitioner Roy, a state prisoner proceeding in forma pauperis and pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This proceeding was referred to me by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Roy and McHargue were hitchhiking near Gridley when they met the victims, Clark and Mannix, who had a truck. That night, Clark and Mannix were

found dead near their truck, which was wrecked in a water-filled ditch; Clark was stabbed once and Mannix was stabbed seven times. When Roy and McHargue were found, they both had knives, their pants were wet, Mannix's belongings were found in Roy's pockets and McHargue's wet backpack. A Butte County jury found Roy (1) guilty of second degree murder of Clark, (2) not guilty of robbing Clark, (3) not guilty of using a knife in the murder of Mannix but (4) guilty of aiding and abetting the first degree murder and robbery of Mannix armed with but not using a knife.[1]

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1. The jury convicted Roy of the robbery and first degree murder of Mannix and found that he possessed but did not use a knife in the commission of those offenses. People v. Roy, 207 Cal.App.3d 642, 644 (1989) ("Roy I"); Clerk's Tr. ("CT") at 760, 762, 765-66. In a sworn declaration, Robert Shields, the jury foreman, stated that the jury unanimously agreed that Roy was guilty of the first degree murder of Mannix because of aiding and abetting a felony murder. CT at 1076. Federal Rule of Evidence 606(b) prohibits the admission of a juror's affidavit concerning any matter or statement occurring during the course of the jury's deliberations or the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or concerning the juror's mental processes in connection therewith. However, Rule 606(b) does not prohibit admission of a juror's affidavit to clarify an ambiguous verdict or to correct a judgment to reflect the intent of the jury. United States v. Stauffer, 922 F.2d 508, 511, 513-14 (9th Cir. 1990); McCollough v. Consolidated Rail Corp, 937 F.2d 1167, 1172, (6th Cir. 1991); J. Weinstein & M. Berger, Weinstein's Evidence § 606[04] at p. 606-30 (1992). Here, because the jury was instructed on several theories of first degree murder, a juror affidavit clarifying the specific theory relied upon is admissible.

The state presented alternative theories. First, the state contended that Roy and McHargue planned to rob and kill the victims. Alternatively, the state contended that the killing occurred during the commission of robbery.

Since the jury found Roy guilty of only second degree murder of Clark and not guilty of robbing Clark, the California Court of Appeal inferred that the jury found that Roy did not plan to murder either victim, i.e., it rejected the state's first theory thus leaving the theory that the killings occurred during the commission of robbery.

Under California law, Roy might be convicted of felony-murder if Mannix's death was unintentional but nonetheless a natural, reasonable or

probable consequence of robbery. But Roy could be found guilty of the special circumstance of a murder in the course of a robbery, which finding exposed Roy to the death penalty, only if Roy acted with the intent to aid in the killing.

The California Court of Appeal found that the evidence supported reasonable inferences by the jury that two simultaneous fights ensued following the wreck of Mannix's truck; that Roy fought Clark while McHargue fought Mannix; that Roy independently fatally injured Clark and McHargue mortally injured Mannix; that thereafter, McHargue dragged or struggled with Mannix to the ditch where McHargue drowned Mannix; and that Roy's only participation in the offenses against Mannix was taking Mannix's property or assisting McHargue so to do. Roy I, slip op. at 20.

The jury was not instructed that it must find that Roy intended to aid the killing of Mannix in order to be found guilty of the charged special circumstance and, accordingly, the court of appeal reversed that finding.

On remand from the court of appeal, the trial court resentenced Roy to a minimum prison term of 46 years. People v. Roy, No. C007071, slip op. at 2 (Cal. Ct. App. Sept. 24, 1990) ("Roy II").

Now Roy argues that his felony-murder conviction must also be reversed because the jury was not instructed that to be guilty as an aider and abetter, Roy must have intended to aid and abet McHargue. People v. Beeman, 35 Cal.3d 547 (1984).

Facts

Roy and McHargue went to a liquor store in Gridley were they met James Clark and Archie Mannix. The men conversed and drank beer

together near Mannix's truck. Mannix bought two six-packs of beer with a ten dollar bill. Rep.'s Tr. ("RT") at 2218-19, 2222-23. Later, Mannix bought more beer. RT at 2227.

About 9:00 p.m., police officers stopped Mannix's truck, McHargue was driving, and Roy, Mannix and Clark were inside. Mannix was wearing a western-style vest with long straps and knee-high leather moccasins. RT at 2042, 2392. There were two backpacks in the truck. RT at 2043, 2393. The officers saw the four men again at the liquor store before 11:00 p.m. RT at 2050, 2088, 2396.

About 11:15 p.m., Marie Koehler Smart saw two men standing by the side of the truck which was in a ditch. Smart spoke to McHargue while the other man stood near her car. RT at 2471. McHargue told Smart that they had already called for help. RT at 2473. As Smart turned to depart, she

saw another person laying on the ground by the side of the truck; the person appeared to be injured but was moving. RT at 2474-75. Smart saw McHargue and the other man walk back to where the man was lying and stand over him. RT at 2476.

Police arrived about 1:30 a.m. RT at 2050-51, 2054, 2061, 2096. They found skid marks measuring approximately 50-100 feet behind the truck. RT at 2077-78, 2635. Clark's body was lying across the ditch, on his back. RT at 2057-58, 2404-05. Clark was fully clothed, his shirt was unbuttoned, he was wet and muddy, had no vital signs, and had a puncture wound in the middle of his chest. RT at 2058, 3283. Mannix's body was found under the truck, submerged in water; his clothing except for his pants had been removed, his pants were pulled down to his knees, and his moccasins were gone. RT at 2063-64, 2406-07.

There was about twelve inches of water in the ditch. RT at 2621, 2632. The truck was about five and a half feet above the water in the ditch. RT at 2626. There were scattered papers and a wallet, containing Mannix's drivers license and one dollar, in the brush near the truck. RT at 2628, 2637, 2645. The papers were dry. RT at 3305. A dime lay near Clark's body. RT at 2630-31.

About 3:00 p.m., officers found McHargue and Roy at a restaurant. RT at 2069, 2071-72, 2094. They had been there for two hours. RT at 2968-69. Both men had buck knives. RT at 2072-73, 2501. Roy's pant legs were wet from the calf down. RT at 2285-86. McHargue's pants were completely wet from the knees down, possibly from the waist down, and his shoes were muddy. RT at 2448-49, 2450. McHargue's backpack was very wet and contained Mannix's brown knee-high moccasins and a

brown vest with long straps which were soaking wet. RT at 2424-25, 2451.

Roy first denied he was with Mannix and Clark when the truck went into the ditch. RT at 2173. An officer noticed that Roy's backpack was wet and muddy and its contents were wet. RT at 2176. Roy then admitted that he and McHargue were with Mannix and Clark at the accident scene. RT at 2293. Roy stated that McHargue was driving the truck, lost control on Block Road, went into a ditch and wrecked the truck. RT at 2179-81, 2293. Roy stated that he and Clark climbed out of the passenger window, went through the ditch onto the bank, that Clark was jumping up and down on the embankment and shouting, and that Clark struck Roy in the chest and stomach. RT at 2181-82, 2293. Roy stated that he removed his buck knife, stabbed Clark once in the chest because Clark was attacking him, Clark fell on

his back, and Toy then told Clark "he was sorry he had to do that." RT at 2182-83, 2194. Roy stated that he then went to where McHargue was standing and saw that Mannix was in the ditch. RT at 2183-84. Roy did not know how Mannix got into the ditch, did not know what Mannix and McHargue had been doing, and denied being involved in the altercation with Mannix. RT at 2184, 2294-95, 2303. Roy denied taking anything from Clark or Mannix. RT at 2302. Roy stated that he and McHargue then walked back into town. RT at 2302. Among Roy's possessions, police found $170.53 cash and Mannix's wristwatch. RT at 2309-10, 2666-68.

One of the pockets on Clark's pants was turned inside out. RT 2690. Clark died from a stab wound to his heart. RT at 2696.

Mannix suffered multiple scratches on his body and several stab wounds. RT at 2699-2700, 2711.

Mannix was stabbed once in the left chest through the heart, once in the abdomen, and five times above his left hip and on the hip. RT at 2700, 2711-13. Mannix also drowned. RT at 2701. Either the drowning by itself or the stab would by itself could have killed Mannix. RT at 2701.

The stab wounds found on Mannix and Clark were consistent with the buck knives taken from Roy and McHargue, however, a pathologist could not determine which knife inflicted which wounds. RT at 2725-26, 2730.

Williams Hudspeth met Roy while the two were confined at the Butte County Jail. RT at 3084. Hudspeth testified that Roy said that when he and McHargue arrived in Gridley they wanted to sell blood in order to get some money because neither had money. RT at 3091. Roy said that he and McHargue planned to rob the men they were drinking beer with

in Gridley and take their truck and Roy mentioned that they would have to "take them out, meaning Archie Mannix and the other person in the pickup." RT at 3123-24. Hudspeth explained that to take someone out means to kill them. RT at 3126. Roy said that he and McHargue took the younger man out and that he was the "easy one," then they worked on the bigger man who McHargue was having a hard time with. RT at 3126-27. Roy said that he stabbed the bigger man in the lower part of the body and, because he was not sure if he was dead, Roy and McHargue shoved his head in the water; after that Roy and McHargue left in the truck. RT at 3127, 3135-36. Roy said he and McHargue took the two men's money, between $150 and $160, some clothes, and a vest Roy wanted. RT at 3128-29. Hudspeth also stated that Roy said the pickup truck was stuck off the side of the road, so he and McHargue started walking

back towards town when another vehicle picked them up. RT at 3133.

Joy Hudspeth, William Hudspeth's wide, testified that she received letters from William Hudspeth, who was in the state prison system, discussing his forthcoming testimony and stating "Can you imagine on the stand I have to look at him. I've got to kill a guy. That hurts. Hope he gets double life instead. Very hard. What I'm going through." RT at 3510, 3512-15, 3536. Hudspeth also stated "I hope Mattly comes through for me on his promise." RT at 3537. The district attorney's name was Mattly. RT at 1. Hudspeth subsequently testified in rebuttal that the "promise" referred to was to be taken out of the California State prison system into another state prison for his safety. RT at 4508. Hudspeth testified that state prisoners who testify jeopardize their safety. RT at 4508-09. Hudspeth hoped that Mattly could get

him a job. RT at 4512. Hudspeth testified that Mattly never made him any promises to get him to testify. RT at 4509.

Sidney Hall also met Roy while the two were confined at the Butte County Jail. RT at 3196. Hall testified Roy said that when he arrived in Gridley he had a little money. RT at 3214. Roy said that Clark and Mannix were mad because the truck was wrecked and that Clark hit Roy in the head with a stick. RT at 3200-01, 3217. Roy said that he killed Clark by stabbing him with a buck knife. RT at 3200-01, 3259. Roy said that McHargue and Mannix were fighting, that McHargue was "getting the worst end of it," and that Roy went over to help McHargue. RT at 3203. Roy did not say how he helped McHargue with Mannix. RT at 3203. Roy said that Mannix had to die because he was a witness and that he was stabbed and drowned, but Roy later retracted the statement

and said that it was not so. RT at 3203-04. Roy never said that he stabbed Mannix. RT at 3266. Roy said that after the deaths, McHargue took a vest and some high-top moccasins, and Roy and McHargue walked back to Gridley. RT at 3218-19. Roy also said that he did not take anything from Clark or Mannix. RT at 3240, 3258.

A criminalist tested Roy's buck knife and found ABO type A blood near the base of the blade. RT at 2908-09. Mannix was ABO type A and Clark was AB0 type O. RT at 2807-10, 2910-11. The criminalist could not determine that the type A blood found on Roy's knife was Mannix's blood. RT at 2963. A forensic serologist performed a blood test on blood taken from Roy and determined that Roy is ABO type A. RT at 3764.

A psychologist opined that Roy has "borderline intellectual functioning or borderline

intellectual retardation," and "substantial and significant brain damage or neurological impairment." RT at 3576-77, 3642-43. A board certified psychiatrist testified that Roy did not have the capacity to form a clear and deliberate intent to kill a human being on September 14, 1981. RT at 4279-80. He also opined that Roy did not have a normal capacity to weigh and consider the question of killing a human being. RT 4281.

A psychiatrist testified that neither psychiatrist nor psychologists have the expertise to decide whether an individual is capable of forming the intent to kill. RT at 4426.

Discussion

Roy contends that the trial court's failure to instruct the jury that intent is an element of aiding an abetting was harmful constitutional error because it relieved the state of its burden of proving all elements

of the offense beyond a reasonable doubt. Roy also contends that the omission resulted in an unconstitutional directed verdict against Roy, depriving him of a jury trial upon an element of the offense charged.[2]

Due Process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime

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2. See Martinez v. Borg, 937 F.2 422, 424 (9th Cir. 1991) ("In Carella [v. California] . . . Justice Scalia reasoned traditional harmless error analysis is inappropriate in the context of incomplete jury instructions because it substitutes the appellate court's findings of fact for the jury's and is akin to an impermissible directed verdict.") Respondents contend that Roy's claim that the trial court directed a verdict in violation of his right to a jury trial is unexhausted. Answer at 30. Roy's habeas petition to the California Supreme Court, attached to respondent's answer as Exhibit K, makes it clear, however, that Roy has exhausted his direct verdict claim. See Ex. K at 5, 8. Roy contends that an instructional error omitting an essential element cannot be harmless because it results in a directed verdict, depriving a defendant of a jury trial. The Ninth Circuit has rejected this per se approach, however. Hennessy v. Goldsmith, 929 F.2d at 514-16 & n. 3. In Hennessy, the Ninth Circuit noted that in Rose v. Clark, 478 U.S. 570, 578, 106 S.Ct. 3101, 3106 (1986), the Supreme court "distinguished instructional error from a directed verdict against a criminal defendant; in the latter instance 'harmless-error analysis presumably would not apply.'" Hennessy, 929 F.2d at 515. The Ninth Circuit found, however, that Rose did not equate failure to instruct the jury on every element with a directed verdict, and instead broadly applied harmless error analysis.

with which he is charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). Failure to properly instruct a jury regarding an element[3] of a charged crime is a constitutional error that deprives the defendant of due process unless the error is harmless. Hennessy v. Goldsmith, 929 F.2d 511, 514 (9th Cir. 1991).

The jury was instructed that "[a] person aids and abets the commission of a crime if with [1] knowledge of the unlawful purpose of the perpetrator of the crime he [2] aids, promotes, encourages or instigates by act or advice the commission of such crime." RT at 5780.

After Roy's trial, but before his conviction became final, the California Supreme Court held that when the defendant's intent is ambiguous, an

3. The substantive elements of a criminal offense are defined by state law. See Jackson v. Virginia, 443 U.S. 307, 324 n.16, 99 S.Ct. 2781, 2792 n.16 (1979).

aiding and abetting conviction requires "proof that an aider and abettor rendered aid with an intent or purpose of either committing, or of encouraging or facilitating commission of, the target offense. People v. Beeman, 35 Cal.3d at 551.

In Beeman, the defendant was convicted of aiding and abetting robbery upon the testimony of others that he was extensively involved in planning the crime, drew a floor plan of the scene, and possessed part of the loot. Beeman testified that two days before the robbery, he told the others that he wanted nothing to do with it and that he furnished the floor plan for an innocent purpose. The jury was instructed that a person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime. The California Supreme

Court held that an aider and abettor must act with knowledge of the perpetrator's criminal purpose and intent; otherwise conviction is allowed if the defendant, knowing of the perpetrator's unlawful purpose, negligently or accidentally aided the crime.

The United States Court of Appeals for the Ninth Circuit has held that "Beeman" error is constitutional error when it precludes the jury from finding each element of the crime beyond a reasonable doubt. Martinez v. Borg, 937 F.2d 422, 423 (9th Cir. 1991).[4] In that case, the defendant was convicted of aiding and abetting the second degree murder of one

4. The error is harmless, however, if no rational jury would have made its findings without also finding that the defendant had the specific intent to aid the crimes committed by the perpetrator. Martinez, 937 F.2d at 423, 424. Yates v. Evatt, 111 S.Ct. 1884 (1991), involved a mandatory rebuttable presumption that shifted the burden to the defendant. Yates requires weighing the probative force of the evidence considered by the jury, in accordance with the instruction, as against the probative force of the presumption standing alone. 111 S.Ct. at 1893. Yates has no application to a case involving Beeman error, where an element of the offense is omitted. See Martinez, 937 F.2d at 424. If an instruction omits an element, a court cannot weigh the evidence considered by the jury in accordance with the omitted element.

peace officer and of the attempted murder of another. The evidence was that the murder weapon was usually carried by defendant but that the perpetrator suddenly shot the officers from a car window at point-blank range. The court found that the jury could have found that defendant aided the murder by supplying the murder weapon without necessarily finding that appellant intended the gun to be used to kill the officers. Because the court could not determine that the jury necessarily found specific intent in order to reach its verdict, the instruction omission was not harmless. Id. at 425-26.

Absence of a Beeman instruction, however, does not necessarily remove the issue of intent from the jury's consideration. Only when the defendant's act is not intended, e.g., it is involuntary, or if the defendant, intending the act, did not know that it would aid the perpetrator's criminal venture, is

the Beeman instruction required.[5] That was the case in Martinez but it is not the case here.

McHargue and Roy hitchhiked to Gridley. Mannix paid for beer and owned a truck. McHargue and another man were seen standing over a shirtless, living, wounded man. Roy admitted stabbing Clark. Mannix's shirtless body was found submerged in water under his truck. Mannix died either from being stabbed or drowned. Mannix's wallet was found with one dollar in it. Upon his arrest, Roy's pants were wet from the calf down. Police found $170 and Mannix's wristwatch among Roy's possessions. Roy at first denied being with Mannix and Clark when the truck went into the ditch but then admitted being there. Roy told Hall that he "helped" McHargue when

5. See Hart v. Stagner, 935 F.2d 1012-13 (Beeman error harmless when defense was not lack of intent, but that Hart was not present during crimes); Cf. Martinez, 937 F.2d at 425 n.2; Willard v. California, 812 F.2d 461, 646 (9th Cir. 1987) (Beeman error harmless where intent is not a live issue at trial).

McHargue and Mannix were fighting. Type A blood was found on Roy's knife; Roy and Mannix had type A blood. Hudspeth testified that Roy admitted a plan to rob Clark and Mannix and admitted robbing both. Hall testified that Roy admitted helping McHargue with Mannix.

Roy did not argue that he did not intend to aid and abet McHargue. Roy's statement to the police was that he did not know how Mannix got into the ditch, did not know what Mannix and McHargue had been doing, and denied being in the altercation with Mannix. RT at 2184, 2294-95, 2303. Defense counsel argued that Mannix received dollar bills in change for the beer, that Roy did not have any dollar bills in his wallet, that there was no evidence the money in Roy's wallet came from Mannix or Clark, that Roy earned that money, that McHargue gave the wristwatch to Roy after McHargue killed Mannix, and

that Roy did not have Mannix's keys. RT at 5695-5700, 5709-10.

The record shows that the jury could not have reached its verdict of aiding and abetting without also finding that Roy had specific intent to aid and abet the robbery of Mannix; i.e., that Roy knew the full extent of McHargue's criminal purpose to rob Mannix, and Roy gave aid or encouragement with the intent or purpose of facilitating McHargue's commission of the crime. See Beeman, 35 Cal.3d at 560.

There is no ambiguity here as there was in Martinez and the instruction given did not remove the issue of intent from the jury's consideration or result in a directed verdict.

Roy contends that intent was a live issue because of expert testimony on Roy's mental limitations, his lack of capacity to form the requisite

intent for murder, and because Roy tendered a diminished capacity defense.[6] However, the jury convicted Roy of the second degree murder of Clark. In California, second degree murder requires proof of malice aforethought and is a specific intent crime. Cal. Penal Code §§ 187-189; People v. Gorshen, 51 Cal.2d 716, 732 (1959). The jury was instructed that if Roy's mental capacity was diminished--from mental illness, mental defect, intoxication or other cause--to the extent that there was a reasonable doubt whether Roy was able to form the mental states constituting either express or implied malice aforethought, the jury could not find him guilty of second degree murder. RT at 5797-98. Because the jury convicted Roy of the

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6. For crimes committed before 1982, (see People v. Smith, 34 Cal.3d 251 (1983), People v. Velez, 175 Cal.App.3d 785, 792 n.7 (1985), People v. McCoy, 150 Cal.App.3d 705 (1984)), California law provided that "evidence of diminished mental capacity, whether caused by intoxication, trauma, or disease, can be used to show that a defendant did not have a specific mental state essential to an offense." People v. Conley, 64 Cal. 2d 310, 316 (1966); see People v. Saille, 54 Cal.3d 1103 (1991).

second degree murder of Clark, they necessarily rejected Roy's diminished capacity defense.

I find that there was no federal constitutional error in the trial court's jury instructions. Accordingly, it is

RECOMMENDED that the petition for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the Honorable David F. Levi pursuant to 28 U.S.C. § 636(b)(1)(C). Any party may file written objections to these findings and recommendations pursuant to Fed. R. Civ. P. 72(b) and L.R. 305(b) within ten days after service.

Dated: Mar -4 1993.

/s/
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

ORDER DENYING WRIT OF HABEAS CORPUS

S012052

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

IN RE KENNETH ROY

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

SUPREME COURT
FILED NOV. 21, 1989
Robert Wandruff, Clerk
Deputy

/s/
Chief Justice

APPENDIX G

IN THE

COURT OF APPEAL OF
THE STATE OF CALIFORNIA

IN AND FOR THE

THIRD APPELLATE DISTRICT

PEOPLE OF THE STATE
OF CALIFORNIA
Plaintiff and Respondent

vs.

3 Crim. C000992
Butte 76386

KENNETH DUANE ROY
Defendant and Appellant

REMITTITUR TO COUNTY CLERK

I, ROBERT L. LISTON, Clerk of the Court of Appeal of the State of California for the Third Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion entered in the above entitled cause that has now become final.

WITNESS my hand and the seal of the Court affixed at my office this 9th day of May, 1989.

ROBERT L. LISTON, Clerk

By: /s/

SEAL Deputy

Receipt of the original remittitur in the above case is hereby acknowledged.

Dated: County Clerk

By:

Deputy

cc: see Mailing List

APPENDIX H

ORDER DENYING REVIEW

AFTER JUDGMENT BY
THE COURT OF APPEAL

3rd District, No. C000992

S009253

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

KENNETH DUANE ROY

Appellant's and Respondent's petitions for review DENIED. The request for an order directing depublication of the opinion in the above-entitled cause is DENIED.

/s/
Chief Justice

SUPREME COURT
Filed May 4, 1989
Robert Wandruff, Clerk
Deputy

APPENDIX I

IN THE

COURT OF APPEAL OF
THE STATE OF CALIFORNIA

IN AND FOR THE

THIRD APPELLATE DISTRICT

PEOPLE OF THE STATE
OF CALIFORNIA
Plaintiff and Respondent

vs.

3 Crim. C000992
Butte 76386

KENNETH DUANE ROY
Defendant and Appellant

By the Court:

Appellant's petition for rehearing is denied.

Dated: February 22, 1989

EVANS, Acting P.J.

- - - - - - - - - - - - by: /s/

cc: see Mailing List

FILED FEB 22 1989
COURT OF APPEAL - THIRD DISTRICT
Robert L. Liston, Clerk
Deputy

APPENDIX J

FILED JAN 27 1989
COURT OF APPEAL - THIRD DISTRICT
Robert L. Liston, Clerk
Deputy

(SEE DISSENTING OPINION)

CERTIFIED FOR PARTIAL PUBLICATION

THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,	)	C000992
	)	
Plaintiff and Respondent,	)	(Super. Ct.
	)	No. 76386)
v.	)	
	)	
KENNETH DUANE ROY,	)	
	)	
Defendant and Appellant.	)	

APPEAL from a judgment of the Superior Court of Butte County, Loyd H. Mulkey, Jr., Judge. Reversed in part, affirmed in part and remanded for resentencing or retrial.

Frank O. Bell, Jr., State Public Defender, under appointment by the Court of Appeal and Julia Cline Newcomb, Deputy State Public Defender, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Robert D. Marshall and Cynthia G. Besemer, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Kenneth Roy was convicted of the first degree murder of Archie Mannix (Pen. Code, § 187[1]; count II) and his robbery (§ 211; count IV) after a jury trial and was found to have possessed but not to have used a knife during these offenses (§ 12022, subd. (b); counts II and IV). He was also convicted of the second degree murder of James Clark (§ 187; count I) and of personally using a knife during that killing (§ 12022, subd. (b)), but was acquitted of his robbery (§ 211; count III). The Mannix murder formed the basis of two special circumstances findings, (1) that it was committed during the commission of a robbery (§ 190.2, subd. (a)(17)(i); count II) and (2) that it was one of two offenses of murder in the first or second degree (§ 190.2,

1. Unless otherwise noted, all further references will be to the Penal Code.

subd. (a)(3); count II).[2] Penalties were imposed of life imprisonment without possibility of parole for the murder-robbery of Mannix (count II), 15 years to life for the murder of Clark (count I), plus a one-year enhancement for use of a weapon (count I), and five years for the Mannix robbery (count IV). Defendant appeals contending the court made instructional errors.

We shall strike the special circumstance findings and vacate the sentence predicated upon them. In all other respects we shall affirm the judgment. In the published portion of this opinion[3] we find the special circumstance findings infirm for the reason that the jury reasonably could have read the instructions, as given, argued and applied to the evidence, to authorize

2. Defendant was also charged with kidnapping Clark and Mannix for purposes of robbery (counts I and VI, § 209, subd. (b)) and robbing Clark (count III, § 211). Defendant's motion to strike the two kidnapping charges was granted October 26, 1983, and the jury found him not guilty of the robbery charge.

3. The Reporter of Decisions is directed to publish the opinion except for parts II and III of the Discussion.

the aggravated punishment for defendant on the ground he aided and abetted the robbery of Mannix, the natural and probable consequence of which was his killing by another (McHargue). That reading violates section 190.2, subdivision (b), which precludes imposition of the special circumstance for aiders and abettors of a felony murder who intend the commission of the felony but not the killing. (See People v. Anderson (1987) 43 Cal.3d 1104.) In the unpublished portion of the opinion we hold (a) it was harmless error to give CALJIC No. 3.01 (1980) as it preceded People v. Beeman (1984) 35 Cal.3d 547 and (b) it was harmless error to fail to give CALJIC No. 5.17 sua sponte relating to an honest but unreasonable belief in the necessity of self defense.[4]

4. Our dissenting colleague does not disagree with these holdings, although he feels it necessary to discuss them anyway, from his own vantage point, as part of "a homogenized discussion" of the issues tendered in the published portion of this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On September 13, 1981, defendant and a friend, Jesse McHargue, were hitchhiking near Gridley. In Gridley, they went to a liquor store where they met the victims, Clark and Mannix. The men struck up a conversation and drank beer together near Mannix's truck.

At approximately 9 p.m. that evening, Gridley Police Officer Stan Massey saw Mannix's truck backing up near the liquor store, almost hitting a utility pole and some signs. He stopped the truck to talk to the driver, McHargue. The four men were occupants. Defendant and McHargue appeared to be sober, but neither had a driver's license. Because Mannix and Clark were visibly intoxicated, Officer Massey advised all four men not to drive. Massey noticed two backpacks in the bed of the truck.

At approximately 11:15 p.m. that same night, as Marie Koehler Smart drove through the intersection of Block Road and Evans-Reimer Road, near Gridley, she noticed two silhouettes and also saw a truck in the ditch. Smart turned her car around so it was heading south on Block Road and then stopped with her high beams illuminating the area where the truck was resting. She saw two men standing on the bank to the left side of the truck. When she asked if they needed help, the two men approached the car. One of the men, later identified as McHargue, went up to the car window and told Smart they had summoned help. As Smart made a U-turn to leave, she noticed a man lying on the ground to the left side of the truck at the location she had first observed McHargue and his companion. The man was shirtless and appeared to be hurt; he moved his hands "up towards his stomach, then back down." Smart saw McHargue and the other man

walk back over to where the man was lying and stand over him.

Early the next morning, officers found Mannix's truck "nosed" into a six-foot-deep ditch. Although there were 12 inches of water in the ditch, no part of the truck was submerged because both ends rested on the opposite walls of the steeply sloped ditch. The front end rested against the south bank. Fifty-feet-long skid marks were found on "Block Road south." Clark's body was found in an empty field on the south side of the ditch in front of the pickup. His clothing was wet and muddy. One of his pants pockets was turned inside out and his shirt was open. A dime was found about four feet from his foot. Mannix's body was found in the ditch partially under the truck. His body was partly submerged in the water. The only clothing remaining on his body was a pair of pants pulled down to his thighs. Both men had stab wounds.

Blood was found on the blackberry bushes on the embankment directly behind the truck above the spot where Mannix's body was discovered. A wallet and some papers were found scattered 10 to 15 feet down the road, east of the truck. The wallet and papers were dry. Mannix's shirt was later found in the ditch.

After the bodies were discovered, Officers Massey and Dustin commenced a search for defendant and McHargue and found them in a restaurant. Both men were carrying buck knives. McHargue's pants were completely wet, either from the thighs or the waist down. Defendant's pantlegs were wet to the calf. After they had been informed of their Miranda rights, defendant and McHargue authorized a search of their backpacks. In McHargue's backpack, Mannix's water-soaked moccasins and vest were found. Defendant's backpack and its contents were also wet.

Defendant at first denied being in the truck with Mannix and Clark, claiming he and McHargue left the two men at the liquor store. During questioning, he admitted being in the truck when McHargue lost control while making a turn. Defendant said that after he and Clark left the truck, Clark began hitting him; defendant then stabbed Clark once in the chest. Defendant said he then told Clark he "was sorry he had to do that." He retrieved his backpack and crossed the ditch to the place where McHargue was standing. At that point, he said, Mannix was already in the ditch.

After defendant's arrest, Mannix's watch was found among defendant's personal belongings. He also had $170 in his wallet.

The medical examiner testified that Clark died from a single stab wound to the chest and that Mannix had multiple stab wounds and scratches on his body and had drowned. Mannix was stabbed in the left

chest, in the upper left portion of his abdomen, and five times on his lower left flank. The cause of death was either the stab wound to the chest or the drowning. The examiner also testified that five wounds to the lower flank were inflicted after death.

Sidney Hall, a county jail inmate with defendant, testified that defendant told him Clark and Mannix "got mad" after McHargue wrecked the truck when he took a turn too quickly and ended up in the ditch. He admitted stabbing Clark after Clark hit him in the head with a stick. Defendant said that Mannix and McHargue were also fighting and, seeing that McHargue "was getting the worst of it," defendant went over to help him. Defendant did not say in what manner.[5]

Another jail inmate, William Hudspeth, testified that defendant admitted to him that he and

5. Hall said that defendant at one point told him Mannix had to die because he was a witness and that he was stabbed and drowned, but defendant later retracted the statement.

McHargue planned to rob and kill both Clark and Mannix, that they "went on with their plans" and killed Clark first because he was the "easy one." Defendant then assisted McHargue who was having a "hard time" with Mannix. Hudspeth testified that defendant admitted coming up from behind, stabbing Mannix in the lower part of the body, pulling him off McHargue, stabbing him again in the abdomen, and then shoving his head in the water to make certain he was dead. Defendant said that they took between $150 and $160 from the two men; as well as Mannix's vest. After the incident, they got in the pickup and left.

Evidence was presented by the prosecution that a small stain of dried blood found on the base of the blade of defendant's knife was ABO type A blood, matching that of Mannix's blood type. Clark's blood type is ABO type O.

The defense introduced evidence that defendant's blood type is also ABO type A. Defendant's witness, a forensic serologist, testified that if the antigens from the saliva or perspiration of an individual with one blood type are mixed with the blood of another, an incorrect reading of the blood type may result.

The jury returned verdicts as previously set forth.

DISCUSSION

I

The prosecution tendered alternative theories of criminal responsibility; that defendant was guilty of the first degree murders of both Mannix and Clark either because (a) the killings were premeditated or (b) they occurred during the commission of a robbery.

As to the first theory, the People argued that defendant and McHargue had a plan to take the two victims "out in the boonies, and to kill them, to rob

them, take their pickup and proceed north." Consistent with this plan, defendant pounded Clark to the ground, took money out of his pocket, and then thrust the knife in his chest. The district attorney theorized that, because McHargue was having difficulty with Mannix, defendant came to his assistance and inflicted the fatal thrust to Mannix's chest. According to the prosecutor, the evidence established that, based on the similarity between the fatal wounds to both victims, they were inflicted by the same person, i.e., defendant.

The prosecutor argued alternatively that the facts supported a finding of first degree murder under a felony murder theory. According to him, defendant and McHargue took Mannix and Clark out in the isolated area in order to rob them, as supported by the fact that defendant was found with $170 and Mannix's watch and McHargue with Mannix's vest and moccasins. He argued: "[I]f you find this . . . killing took place while the

perpetrator, the defendant . . . was committing a robbery, and intended to rob these people, that is to take their property, and permanently depreive [sic] the people of their property from their immediate possession by force or fear, and a killing resulted, that's also murder in the first degree."

It can be inferred that the jury found that defendant did not plan the murder or the robbery of either Clark or Mannix, since it returned a second degree murder verdict in the Clark killing and found defendant not guilty of the robbery charge with respect to Clark. It also can be inferred that the jury concluded that defendant did not kill Mannix by stabbing, since it found that defendant did not use a knife in connection with his murder. Accordingly, it can be inferred that the jury rejected the prosecutor's argument that defendant planned the robberies or killings. That left the felony murder argument as a likely candidate for the finding of

culpability. On this point the jury was instructed that defendant was responsible for the first degree felony murder of Mannix if he aided and abetted his robbery and was liable for the special circumstance if the murder occurred during the commission of the robbery.

The Mannix murder also formed the basis of two special circumstances findings; that it was committed during the commission of a robbery (§ 190.2, subd. (a)(17)(i)) and that it was one of two murders in the first or second degree (§ 190.2, subd. (a)(3)). The jury was not given instructions which distinguished between the scienter required for findings of felony murder and special circumstance. If the jury found, pursuant to the instructions, that defendant was guilty of the felony murder of Mannix on the theory he aided and abetted the robbery of which the Mannix killing was an unintentional but natural and reasonable or probable consequence, it is inconceivable that it separately found

that defendant intended that McHargue kill Mannix, a finding necessary, as we shall show, to the valid imposition of a special circumstance penalty.

For reasons which we next detail, we will conclude that the jury reasonably could have been led by instructional error to fuse the standards of criminal responsibility and liability for the special circumstance resulting in improper special circumstances findings.

A.

People v. Anderson, supra, 43 Cal.3d at pp. 1138-1148, upholding Carlos v. Superior Court (1983) 35 Cal.3d 131 on this point[6], holds that "[t]he court must

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6. The same standard applies where the special circumstance is predicated upon dual murders. The Penal Code provides that a special circumstance may be found where defendant "has in this proceeding been convicted of more than one offense of murder in the first or second degree." (§ 190.2, subd. (a)(3).) At least one of the offenses must be murder in the first degree. Anderson holds that in such a case the aider and abetter must intend the killing of the victim in (at least) one of the multiple murders and that must be a first degree murder, as specified in section 190.2, subdivision (b) (and the special circumstance instruction given here). (43 Cal.3d at pp. 1149-1150.) Here, there is only one first degree murder. Accordingly, the instructional defect which attends that finding must also infect the multiple murder special circumstance finding.

instruct on intent to kill as an element of the felony-murder special circumstance when there is evidence from which the jury could find (see People v. Flannel (1985) 25 Cal.3d 668, 684-685 [160 Cal.Rptr. 84, 603 P.2d 1]) that the defendant was an aider and abetter rather than the actual killer." (Anderson, supra, 43 Cal.3d at p. 1147.)

The jury was not so instructed. The special circumstance instruction given here, CALJIC No. 8.80 (1981), preceded the 1984 revision (CALJIC No. 8.80), which, following Carlos, supra, explicitly now provides that the accomplice must have "intended to aid in the killing of a human being . . . ." (Emphasis added.) Rather, the jury was instructed in terms which invited the fusion of the distinct standards of guilt and special circumstance. That could occur because the guilt and special circumstance issues are tried simultaneously (§

190.1, subd. (a)) on the same evidence (§ 190.4, subd. (a)).

The jury was given an original and amended version of the instruction on the standards to be applied in determining defendant's liability for the special circumstance arising from the Mannix murder. The jury was told in the instruction read to it that "[i]f you find the defendant in this case guilty of a willful, deliberate, premeditated murder of the first degree, you must then determine if murder was committed" [inter alia] [i]n the commission of a robbery." (Emphasis added.) If that restriction had been allowed to remain, the issue here considered would have been foreclosed. However, the jury instruction was amended after the reading.

In the instructions sent to the jury room, the premeditation restriction was deleted and the jury was told that: "If you find the defendant . . . guilty of

murder of the first degree, you must then determine if murder was committed . . . in the commission of a robbery and/or [he] was convicted . . . of more than one offense of murder in the first or second degree.

" . . . . . .

If . . . Roy, was not the actual killer, it must be proved beyond a reasonable doubt that he intentionally aided, abetted . . . the actual killer in the commission of the murder in the first degree before you are permitted to find the alleged special circumstance of that first degree murder to be true . . . ." (CALJIC No. 8.80 (1981), emphasis added.) "[T]he murder in the first degree" refers to the Mannix murder and, in the circumstances of this case, necessarily encompasses the felony murder theory of culpability.

The reason for the modification is that the district attorney, Mr. Mattly, wished the instruction to be amended to include the felony murder theory of

culpability. This is revealed in the colloquy which followed the reading of the instruction to the jury in the unamended form. "The Court: This was their [the defendant's] instruction? [¶] Mr. Mattly: Yes. So all you need to do is you can give this [amended] one, send it in [to the jury in printed form] but all you need to do is this: 'If you find the defendant in this case guilty' what you would do is you would strike, I think, 'of a willful, deliberate, premeditated murder.'" The court then said: "That is to be included as it is now modified by you gentlemen in the instructions to be delivered to the jury? [¶] Mr. Kenkel: Yes. [¶] Mr. Mattly: Yes." That was done. The modified form, showing the striking of the "willful" language appears in the record. From these events it is clear that the prosecution was pursuing a felony murder theory and the jury was unmistakably informed by the change in instructions that premeditation

was not required for the imposition of the special circumstance.

That was emphasized by a second (unamended) instruction which provided: "To find that the special circumstance, referred to in these instructions as murder in the commission of robbery, is true, it must be proved: [1.] That the murder was committed while the defendant was engaged in or was an accomplice in the commission of a robbery. [¶] 2. That the murder was committed in order to carry out or advance the commission of the crime of robbery . . . . In other words, the special circumstance referred to . . . is not established if the . . . robbery was merely incidental to the commission of the murder." (CALJIC No. 8.81.17 (1980).) The fusion of guilt and penalty theories was further emphasized by two other instructions which told the jury, in identical words with respect to guilt and penalty instructions, first, that "first degree felony murder

based on robbery . . . is not established if the robbery was merely incidental to the commission of any homicide" and, second, that "the special circumstance . . . is not established if the . . . robbery was merely incidental to the commission of the murder." These instructions place the relationship of the robbery to the killing in the identical posture for purposes of culpability, under a felony murder theory, and penalty as a special ciscumstance.

To expand on this point, the first instruction (as amended) refers to "the murder of the first degree," i.e., the Mannix murder, and informs the jury that if it finds defendant guilty of that murder it must determine whether it "was committed . . . in the commission of a robbery and [that]

" . . . . . .

[i]f defendant . . . was not the actual killer, it must be proved . . . that he intentionally aided, abetted . . . the

actual killer in the commission of [that] murder . . . ." The second instruction tells the jury that if the murder was "in the commission of robbery" "it must be proved [inter alia] the defendant . . . was an accomplice in the commission of a robbery." (Emphasis added.) The words "aided, abetted" and "accomplice" are not defined in the special circumstance instructions. The definitions of these terms are to be found only in the instructions on the issue of guilt.

There, the jury was instructed that "[i]f a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all persons who . . . with knowledge of the unlawful purpose of the perpetrator of the crime aid . . . its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental." (CALJIC No. 8.27 (1979), emphasis added.) It was also instructed that the

"unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the commission of or attempt to commit the crime of robbery, and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree." (CALJIC No. 8.21.) The jury was further instructed that "[o]ne who aids and abets is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged." (CALJIC No. 3.00 (amended by CALJIC No. 4.25.) These instructions made clear that the aider and abettor of a felony murder need not intend the killing.

It bears repetition that the jury was instructed on the relationship of the Mannix murder to the Mannix robbery in identical terms in both the guilt

and penalty instructions, that "first degree felony murder based on robbery . . . is not established if the robbery was merely incidental to the commission of any homicide" and that "the special circumstance . . . is not established if the . . . robbery was merely incidental to the commission of the murder."

In sum, the jury was told that it could find defendant guilty of the first degree felony murder of Mannix if he intended his act of assistance to aid the robbery and the killing was the natural and probable product of the robbery, whether he intended that result or not. It was also told that if <u>that</u> murder were committed in the commission of a robbery a special circumstance finding is warranted. By any account of the instructions, a concrete link was forged between the guilt and special circumstance instructions. Indeed it is inconceivable that the jury, having found defendant guilty of the first degree murder of Mannix on the theory that

it unintentionally resulted from an intended robbe
would not have concluded that the murder occurr
during the commission of a robbery, justifying t
imposition of the special circumstance.

The explicit fusion of guilt and pena
instructions permits, indeed invites, the violation of
standard set down in People v. Anderson, supra.

B.

A contrary conclusion is suggested by
recent case of People v. Warren (1988) 45 Cal.3d
It held that the trial court did not have to instruct
jury that the accomplice must intend the killing beca
"all the evidence shows that the defendant either actu
killed the victim or was not involved in the crime a
. . . ." (Id., at p. 487.)

Notwithstanding this dispositive holding
court in dictum went on to say that the instructio
special circumstances correctly stated the law and w

not have misled a reasonable jury into believing that an intent to rob sufficed for the special circumstance. That instruction provided that the jury could impose the special circumstance if "'the defendant was . . . a person who intentionally aided, abetted . . . the actual killer in the commission of murder in the first degree.'" (Warren, 45 Cal.3d at p. 487.) The court observed that "in the context of this case the challenged instructions might conceivably be construed in a different manner. In delivering its charge the court defined first degree felony murder: 'The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the commission of . . . the crime of robbery, and where there was in the mind of the perpetrator the specific intent to commit the crime of robbery, is murder of the first degree.'" (Ibid.) The court concluded, however, that "the instructions . . . would not be so construed by a reasonable juror [for] one could

understand the charge as requiring an intent to rob and nothing more only if [a jury] parsed it in a hypertechnical manner." (Id., at p. 488.) We are not told in what manner the jury would correctly "parse" the instruction. We are told that the court was convinced that the jury would not have linked the standards for guilt and special circumstance.

However, that was said in the context of a case in which "all the evidence shows that the defendant either actually killed the victim or was not involved in the crime at all . . . ." (45 Cal.3d at p. 487.) Accordingly, there was no factual predicate by which to reach the issue of reasonableness nor to determine whether the jury could have made the linkage on the facts of the case. That circumstance led three concurring justices to remark that the observation by the majority opinion is dictum. (Id., at p. 490.) Dictum is not

binding as a holding. (See, e.g., People v. Milner (1988) 45 Cal.3d 227, 237.)

In any event, Warren is distinguishable on its facts and instructions. The sole, generalized instruction on the standards for the special circumstance finding considered in Warren did not explicitly link the criteria for that determination to the standards for the felony murder. In this case, the linkage is explicitly made in the instructions. That linkage is supported by the evidence adduced and the manner in which the case was argued and presented to the jury.

C.

Based on the evidence presented to it, the jury could reasonably have inferred that two simultaneous fights ensued following the wreck of Mannix's truck by McHargue; defendant fought Clark while McHargue fought Mannix. The jury could have found that the lower part of defendant's pants became wet when he got

out of the truck, when he fought with Clark, and/or when he crossed back across the ditch after killing Clark. The jury could have inferred that Mannix was injured, possibly fatally, but still alive when defendant came over to the location of the Mannix/McHargue altercation. The jury may have believed that at that point defendant either personally robbed Mannix of some of his personal possessions or assisted McHargue in his taking of Mannix's property. It is a further permissible inference from the evidence that McHargue then either dragged Mannix to the ditch and drowned him or that Mannix was able to muster up his last bit of strength and continued to fight McHargue in the ditch. The fact that McHargue's pants were wet up to his thighs or waist would support a conclusion that McHargue personally drowned Mannix. The finding by the jury that defendant did not use a knife during the commission of the offense against Mannix reveals that the jury rejected the theory

that defendant inflicted the fatal stab wounds on Mannix. Thus, it is reasonable to conclude that the jury inferred that defendant's only participation in the offenses relating to Mannix was his taking of Mannix's personal property while he was still alive or his assistance in McHargue's taking of the property.

D.

That leads us to consider whether the instructional error was harmless.

As we have observed, Anderson holds that "[t]he court must instruct on intent to kill as an element of the felony-murder special circumstance when there is evidence from which the jury could find (see People v. Flannel (1985) 25 Cal.3d 668, 684-685 [160 Cal.Rptr. 84, 603 P.2d 1]) that the defendant was an aider and abettor rather than the actual killer." (Anderson, supra, 43 Cal.3d at p. 1147.) This applies to both felony murder

and multiple murder grounds of special circumstance. (See Anderson, supra, at pp. 1147 and 1149-1150.)

Until recently the California Supreme Court has had no occasion to discuss the standard for harmless error applicable to a failure to give the intent instruction required by Anderson. That is so because in each case in which the issue was tendered the court determined that the instruction was not required because the issue of aiding and abetting was not before the jury. This determination was variously founded (a), as in People v. Anderson, supra, on the ground there was no evidence warranting a finding that the defendant was an aider and abettor of a felony murder (See People v. Hamilton (1988) 45 Cal.3d 351, 363-364 and People v. Warren, supra, 45 Cal.3d at p. 487; People v. Coleman (1988) 46 Cal.3d 749, 779; (b) it was undisputed or conceded or uncontradicted that the defendant was the actual killer (See People v. Babbitt (1988) 45 Cal.3d 660, 708; People

v. Keenan (1988) 46 Cal.3d 478, 503; People v. McDowell (1988) 46 Cal.3d 551, 566); (c) the issue did not arise because the jury was not instructed on an aider and abettor theory (People v. Melton (1988) 44 Cal.3d 713, 747, fn. 12; see also People v. Bunyard (1988) 45 Cal.3d 1189, 1241); and (d) the jury returned a special verdict that the killing was premeditated. (See People v. Miranda (1987) 44 Cal.3d 57, 89; People v. Boyde (1988) 46 Cal.3d 212, 243.)

However, these cases do imply that if there is evidence from which the jury could permissibly have inferred that the defendant was an aider and abettor of the felony murder the Anderson instruction is mandatory. That is the apparent holding of People v. Garrison (Jan. 5, 1989, S004354) ___ Cal.3d ___. It held that because "there was evidence from which a jury could have based its verdict on an accomplice theory, the court erred in failing to instruct that the jury must find that defendant

intended to aid another in the killing of a human being." (Id., at p. ___ [typed opn. pp. 59-60; fn. omitted.)

Garrison held that such an error is subject to the Chapman standard of harmless error, relying upon People v. Odle (1988) 45 Cal.3d 386, 410-415. Under Chapman v. California (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711], "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." That standard cannot be satisfied, i.e., such a belief cannot be declared, where, as in this case, an inference can be drawn from the record that the jury found that the defendant was liable for the special circumstance on the ground that he intentionally aided a robbery but did not intend the killing that occurred during its commission. If the jury could have made such a finding it (obviously) cannot be said that the error (the

failure to preclude such a possibility by a correct instruction) was harmless beyond a reasonable doubt.

In Garrison the court concluded that the error was harmless on the theory that "the failure to instruct on intent was necessarily resolved adversely to defendant under other, properly given instructions. (See People v. Sedeno [1974] 10 Cal.3d 703.)" (___ Cal.3d at _____ [typed opn. pp. 60-61].) "In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only [in this case] the lesser offense was committed has been rejected by the jury." (Sedeno, supra, at p. 721.) In other words, it cannot be said, viewed from the vantage point of all of the instructions given and the evidence adduced, that the jury could have

drawn an adverse inference from the erroneous instruction.

As we have shown in great detail, that is not the case here. Considering all of the instructions the jury could have drawn the conclusion that defendant was liable for the special circumstance on the theory he aided and abetted the Mannix robbery without intending that Mannix be killed.

Accordingly, the special circumstance findings must be reversed.

II

Defendant next argues that reversible error resulted from the giving of CALJIC Nos. 3.00[7], 3.01[8],

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7. CALJIC No. 3.00 includes as principals in a crime: "Those who, with knowledge of the unlawful purpose of the person who directly and actively commits or attempts to commit the crime, aid and abet in its commission or attempted commission."

8. CALJIC No. 3.01 (1980), as given here reads: "A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the

and 8.27,[9] jury instruction relating to the theory that he aided and abetted the robbery of Mannix Those instructions implicate not only the robbery conviction but also the first degree murder conviction to the extent it was based on a felony murder theory. Citing People v. Beeman (1984) 35 Cal.3d 547, defendant contends the instructions failed to explicitly inform the jury that the offense of aiding and abetting requires an intent to facilitate the criminal offense aided. He argues that this error compels reversal because the intent issue was completely removed from the jury's consideration.

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commission of such crime."

See Footnote 9 next page.

9. CALJIC No. 8.27 (1979), as given reads: "If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all persons who either directly and actively commit the act constituting such crime or who with knowledge of the unlawful purpose of the perpetrator of the crime aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental."

We agree that the challenged instructions do not include, as suggested in People v. Beeman, supra, a clause making explicit the requirement that an aider and abettor must have an intent to facilitate or encourage the offense committed by the perpetrator.[10] (Beeman, supra, 35 Cal.3d at p. 561.) However, as we shall explain, the jury instructions as given could not have misled the jury to defendant's prejudice. (Chapman v. California, supra, 386 US. at p. 24 [17 L.Ed.2d at pp. 710-711]; see People v. Dyer (1988) 45 Cal.3d 26, 59-64.)

The absence of the explicit Beeman clause does not necessarily result in the removal of intent from jury consideration, such as when intent is not put in issue, is conceded, or is covered by other instructions.

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10. Beeman suggests, as an appropriate instruction, "that a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (Beeman, supra, 35 Cal.3d at p. 561.)

(People v. Garcia (1984) 36 Cal.3d 539; see also People v. Ramos (1984) 37 Cal.3d 136, 146-147; People v. Caldwell (1984) 36 Cal.3d 210, 223-224; People v. Allen (1985) 165 Cal.App.3d 616, 628-629.) Moreover, as we recently discussed in People v. Rogers (1985) 172 Cal.App.3d 502, as applied to the facts of a particular case, the instruction found wanting in Beeman (CALJIC No. 3.01 [1980]) and given here, may convey the required intent to the jury because in the circumstances of the case it contains a legally adequate criterion of intent. That is the case here.

As we explained in Rogers, supra, the defect in CALJIC No. 3.01 exposed by Beeman is the "failure to ambiguously articulate the requirement that the defendant simultaneously know both the perpetrator's unlawful purpose and that his act of aid would facilitate that purpose." (Rogers, supra, 172 Cal.App.3d at p. 509.) Borrowing the phrase from People v. Patrick

(1981) 126 Cal.App.3d 952, 967, we referred to this dual knowledge as "'knowing aid.'" We stated that ambiguities in the instruction "are significant if the defendant's act was not intended (e.g., f it were involuntary) or if the defendant, intending the act, did not know that it would aid the perpetrator's criminal venture." (Ibid.; in. omitted; emphasis in original.) As we next explain, as in Rogers, neither of these conditions is tendered in his case.

"That someone knowingly aided a criminal offense is ordinarily descriptive of an intention to achieve that which the actor knows will be achieved by his act of aid. Indeed, if a defendant testifies that he knowingly aided the perpetrator of a crime, the question immediately arises, what else could the defendant say or show that would dissuade us from believing that it was his intent to facilitate the offense? At the least this circumstance calls for an explanation which would defeat

the intention thus ascribed. Although the defendant has no formal burden of defeasance, he is at risk of a conviction if, in this circumstance, he does not raise a reasonable doubt of his intent by the production of evidence negating the ascribed intention. [Citation] [¶] . . . [T]he appropriateness of knowing aid as a criterion of intent, and hence (absent its circumstantial ambiguities) the appropriateness of CALJIC No. 3.01, is dependent upon the facts of the case. CALJIC No. 3.01 [1980] conveys the required intent unless a contrary inference of intent is a material issue in this case." (Rogers, supra, at p. 512.)

We set forth in Rogers examples of what counts as a material issue of contrary intent. In such cases the evidence defeases the intent ordinarily conveyed by knowing aid. In Hicks v. U.S. (1893) 150 U.S. 442 [37 L.Ed 1137], an instruction required the jury to conclude from the mere utterance of words that had

the effect of encouraging the perpetrator to commit an offense, that the utterer intended them to be understood as such. In that case, the defendant had testified that his words were intended to dissuade the perpetrator. The jury instruction thus prevented the jury from considering the defendant's testimony and thus removed the issue of intention.

People v. Bolanger (1886) 71 Cal. 17 presents a second example of evidence defeasing the intent of knowing aid. In that case, a witness challenged as an accomplice stated that he intended to participate in the larceny charged against the perpetrator but had feigned complicity for the purpose of defecting thieves. His defense was that he intended to frustrate the criminal purpose notwithstanding knowledgeable aid. In such circumstances the ordinary inference cannot be derived from such a criterion.

Beeman, supra, 35 Cal.3d 547, presents another example. Beeman admitted that he aided his friends' commission of a robbery and was aware of their perpetration. He testified, however, that he did not believe that they would go through with it and did not want to be involved, thus attempting to negate the intent embedded in the conjunction of his acts of aid and his awareness of the criminal venture. (See also People v. Yarber (1979) 90 Cal.App.3d 895 [where an act of oral copulation by female defendant on male defendant was followed by an act of oral copulation of male defendant by minor, Mary S. the jury should have been specifically instructed of the requirement that the female defendant had the purpose of aiding the perpetrator in the section 288a offense; the court noted that her act of oral copulation was subject to two equally strong inferences, one of which was that she did the act for her own

purposes without regard for whether Mary S. followed suit].)

We turn to the evidence in the present case and consider the factual possibilities in order to determine whether the alleged instructional error could have prejudiced defendant. The first possible scenario is defendant's version that Clark started the fight with him and he ultimately responded by stabbing Clark. He then crossed over to where McHargue was standing. At that point, defendant claimed, Mannix was already in the ditch. Defendant's version could not have satisfied the requirements under CALJIC No. 3.01 as given, i.e., that an aider and abettor have knowledge of the perpetrator's unlawful purpose and aid in the commission of the crime. Based on the instructions given, it is clear the jury rejected defendant's version of the events. A second factual scenario is one presented by the prosecutor. Under one of his theories, defendant and McHargue

took Mannix and Clark out to an isolated area to kill them and rob them. Inmate Hudspeth testified that defendant told him that he and McHargue planned to kill and rob both men and that after defendant killed Clark he assisted McHargue, stabbing Mannix twice. Because the jury returned a second degree murder verdict as to Clark, found defendant not guilty of the robbery of Clark, and found defendant did not personally use a knife with respect to Mannix, the jury could not have believed the facts to be such. They disbelieved Hudspeth's testimony.[11]

A third factual candidate is that supporting the felony-murder theory. According to the testimony of eyewitness Marie Koehler Smart, defendant and

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11. The only argument presented from which the jury might conclude that defendant's fight with Clark itself served as the assistance to McHargue (in that it allowed McHargue to rob Mannix without interference from Clark) was that defendant and McHargue planned to rob and kill the two men before they went to the isolated area. The jury's second degree murder verdict with respect to Clark and the not guilty verdict with respect to the Clark robbery count show that the jury did not believe this theory.

McHargue were both standing on the ditch bank over the obviously injured Mannix. Inmate Hall testified that defendant said that after stabbing Clark he went over to assist McHargue who was fighting with Mannix. The manner of assistance was not revealed.[12] The jury was instructed that in order to find defendant guilty as an aider and abettor of the robbery, it had to find defendant (1) had knowledge of the unlawful purpose of the perpetrator and (2) aided, promoted, encouraged, etc. the commission of the crime. No evidence was present to counter an intent to facilitate the offense, i.e., to show that defendant did not so intend. Thus, the intent conveyed by knowing aid was not defeased. As we said in Rogers, supra, 172 Cal.App.3d at p. 514, "It would be absurd to say that [one defendant] knowingly contributed to the force and fear imposed by [the other

12. To the extent the jury believed defendant personally robbed Mannix, the aiding and abetting instructions are not implicated and therefore could not have prejudiced defendant.

defendant] upon the victim in the course of the robbery but is not culpable as an aider and abettor of the robbery." Under the circumstances of this case, the assistance to McHargue by defendant in the perpetration of the robbery, with defendant's knowledge of McHargue's purpose, unambiguously reveals defendant's awareness of the importance of his acts in advancing the robbery. In other absence of evidence establishing some contrary intent, no other inference is permissible from the act.

Thus, under these facts, as in Rogers, supra, "CALJIC No. 3.01 (1980) adequately conveyed the required element of intention to the jury." (Rogers, supra, at p. 514.) Consequently, defendant could not have been prejudiced by the giving of the instructions challenged here.

III

Defendant next contends that the court committed prejudicial error by failing sua sponte to give CALJIC No. 5.17 which defines an honest but reasonable belief in the necessity to defend oneself[13] and that, as a consequence, the second degree murder conviction of Clark must be reversed. We disagree.

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the

13. CALJIC No. 5.17 provides: "A person who kills another person in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury kills unlawfully, but does not harbor malice aforethought and cannot be found guilty of murder. This would be so even though a reasonable man in the same situation seeing and knowing the same facts would not have had the same belief. Such an honest but unreasonable belief is not a defense to the crime of [voluntary [or] [involuntary] manslaughter."

case.' [Citation.]" (People v. Wickersham (1982) 32 Cal.3d 307, 323.) In People v. Flannel, supra, 25 Cal.3d at pp. 682-683, the court held that the unreasonable belief rule does not invoke such a general principle and that the instruction should be given if the other requirements for a sua sponte instruction are met. However, "the duty to give instructions, sua sponte. . . . arises only it if appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (People v. Sedeno, supra 10 Cal.3d at p. 716.)

Under the facts of this case, the court should have given CALJIC No. 5.17 and erred in failing to do so. However, the error was harmless, because "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (Sedeno, 10 Cal.3d at

p. 721.) The jury was adequately instructed that an honest but unreasonable belief in self-defense can negate malice by the court's reading of CALJIC No. 8.40[14] (voluntary manslaughter - defined) and No. 8.50. CALJIC No. 8.50 provides: "The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. [¶] When the act causing the death, though unlawful, is done [in the heat of passion or is excited by a sudden quarrel such as amounts to adequate provocation] [in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury the offense is manslaughter. In such a case, even if an intent to kill

14. CALJIC No. 8.40 (1979) provides: "The crime of voluntary manslaughter is the unlawful killing of a human being without malice aforethought when there is an intent to kill. [¶] There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion, [or] [in the honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury]. [¶] In order to prove the commission of the crime of voluntary manslaughter, each of the following elements must be proved: 1. That a human being was killed, 2. That the killing was unlawful, and 3. That the killing was done with the intent to kill."

exists, the law is that malice, which is an essential element of murder, is absent. [¶] To establish that a killing is murder and not manslaughter, the burden is on the state to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the [heat of passion or upon a sudden quarrel] [in the honest, even though unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury]." The jury, having found defendant guilty of second degree murder, obviously rejected the manslaughter theory and thereby found that he did not act pursuant to an honest, but unreasonable belief in the necessity to defend himself.

Disposition

The judgment of sentence predicated upon the special circumstance findings is reversed. The judgment is affirmed in all other respects. The case is remanded for resentencing or retrial on the issue of

special circumstances at the option of the prosecuting attorney. (CERTIFIED FOR PARTIAL PUBLICATION.)

BLEASE, J.

I concur:

SIMS, J.

I respectfully dissent; my dissent is directed to the published portion of the opinion only. However, my view of the entire case requires a homogenized discussion of the separate issues. I do concur, as will be discerned from the following discussion, with the balance of the majority opinion on the issues there addressed.

The majority and I differ on the meaning and effect of five recent Supreme Court decisions dealing with Beeman[1]-type error (People v. Anderson (1987) 43 Cal.3d 1104, 1138-1148; People v. Dyer (1988) 45 Cal.3d 26, 59-65; People v. Odle (1988) 45 Cal.3d 386, 410-416; People v. Warren (1988) 45 Cal.3d 471, 486-488; People v. Keenan (1988) 46 Cal.3d 478, 503-504). The effect of the majority opinion would effectively circumvent the clear import of People v. Anderson in overruling the decision of Carlos v. Superior Court (1983) 35 Cal.3d 131, and to ignore the clear and unambiguous statement

1. People v. Beeman (1984) 35 Cal.3d 547.

that the use of former CALJIC No. 3.01 which contains the Beeman-type error is to be treated as Chapman error.[2] (People v. Dyer, supra, at pp. 59-65.)

In addressing the issues specifically raised by the defendant in this dissent, I will illustrate what I believe to be an attempt by the majority opinion, particularly in its published portion, to obfuscate the clear meaning of the cited Supreme Court decisions, supra, and their application to a case such as this, in which the absence of an instruction on specific intent to kill in the felony-murder circumstance by an aider and abettor is asserted as reversible error.

I

Defendant contends the court committed prejudicial error by failing to sua sponte give CALJIC No. 5.17 which defines an honest but unreasonable belief

2. Chapman v. California (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].

in the necessity to defend,[3] and that as a consequence, the second degree murder conviction (Clark) must be reversed. I disagree.

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]" (People v. Wickersham (1982) 32 Cal.3d 307, 323.)

The Supreme Court in People v. Flannel (1979) 25 Cal.3d 668, 682-683, held that the

3. CALJIC NO. 5.17 (5th ed. 1988) provides: "A person, who kills another person in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and cannot be found guilty of murder. This would be so even though a reasonable man in the same situation seeing and knowing the same facts would not have had the same belief. Such an honest but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter."

unreasonable belief rule should be considered a general principle for purposes of jury instruction, and in cases not yet tried, the court should give the instruction sua sponte if the other requirements for such an instruction are met. "[T]he duty to give instructions, sua sponte, . . . arises only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (People v. Sedeno (1974) 10 Cal.3d 703, 716.)

Under the facts of this case, the court should have given CALJIC No. 5.17 and erred in failing to do so. However, the error was harmless, because "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (Sedeno, supra, 10 Cal.3d at p. 721.) The jury was adequately instructed that an honest but unreasonable belief in self-defense

can negate malice by the court's reading of CALJIC Nos. 8.40 (1979 Re-revision)[4] (voluntary manslaughter - defined) and 8.50 (1980 Revision). CALJIC No. 8.50 provides: "The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. [¶] When the act causing the death, though unlawful, is done [in the heat of passion or is excited by a sudden quarrel such as amounts to adequate provocation] [in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury] the offense is manslaughter. In such a case, even if an intent to kill exists, the law is

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4. CALJIC No. 8.40 provides: "The crime of voluntary manslaughter is the unlawful killing of a human being without malice aforethought when there is an intent to kill. [¶] There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion, [or] [in the honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury]. [¶] In order to prove the commission of the crime of voluntary manslaughter, each of the following elements must be proved: [¶] 1. That a human being was killed, [¶] 2. That the killing was unlawful, and [¶] 3. That the killing was done with the intent to kill."

that malice, which is an essential element of murder, is absent. [¶] To establish that a killing is murder and not manslaughter, the burden is on the state to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the [heat of passion or upon a sudden quarrel] [in the honest, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury]." Under the circumstances, the jury obviously found that defendant did not act pursuant to an honest, but unreasonable belief in the necessity to defend, and found him guilty of murder in the second degree.

II

Defendant argues the court committed reversible error by utilizing former CALJIC Nos. 3.00, 3.01, and 8.27. He cites to People v. Beeman, supra, 35 Cal.3d 547, and contends he was denied due process because the jury was not informed that to find him guilty

as an aider and abettor they must find that he specifically intended to encourage or facilitate the criminal act. He also argues the court erred by failing to instruct the jury that they must find intent to kill in order to find him guilty of felony murder.

He grounds his contentions on Carlos v. Superior Court, supra, 35 Cal.3d 131, which has recently been overruled by People v. Anderson, supra, 43 Cal.3d 1104. Anderson holds "intent to kill is not an element of the felony-murder special circumstance [§ 190.2, subd. (a)(17)]; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved." (Pp. 1138-1139.) Accordingly, I conclude that to the extent the jury found defendant to have been the actual killer of Archie Mannix, it was not required, before finding true the felony-murder special circumstance, that defendant intended to kill Mannix.[5] To the extent the

5. Similarly, the multiple-murder special circumstance finding is not infirm. (See People v. Anderson, supra, 43 Cal.3d at p. 1149

jury found defendant to have been an aider and abetter rather than the actual killer, however, I believe the jury, contrary to defendant's assertion, was properly instructed that it had to find defendant intended to kill, as follows: "If defendant Kenneth Duane Roy was not the actual killer, it must be proved beyond a reasonable doubt that he intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer in the commission of the murder in the first degree before you are permitted to find the alleged special circumstance of that first degree murder to be true as to the defendant Kenneth Duane Roy." This instruction is in the language of section 190.2, subdivision (b), which Anderson found unambiguous on the point: "Section 190.2(b) . . . declares that the felony-murder aider and abetter is eligible for the death penalty [or for life

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[overruling People v. Turner (1984) 37 Cal.3d 302, to the extent it holds intent to kill is an element of the multiple-murder special circumstance].)

imprisonment without the possibility of parole] if intent to kill is proved. . . . [G]iven realistic reading the statutory requirement that the aider and abetter intentionally aid, abet, counsel, command, induce, solicit, request, or assist any acts in the commission of first degree murder -- even when applied to felony murder -- is not ambiguous: the aider and abetter must intentionally aid in a killing." (43 Cal.3d at p. 1145, emphasis in original.) I would find no error in the special circumstance instructions given in this case.

Moreover, since People v. Garcia (1984) 36 Cal.3d 539, and People v. Anderson, supra, 43 Cal.3d 1104, the California Supreme Court, in a series of cases involving use of former CALJIC No. 3.01, as modified, in accordance with People v. Yarber (1979) 90 Cal.App.3d 895, has held that Beeman-type error is to be treated as Chapman error. (See People v. Dyer, supra, 45 Cal.3d at pp. 59-65; People v. Odle, supra, 45 Cal.3d

at pp. 410-416; People v. Warren, supra, 45 Cal.3d at pp. 486-488; People v. Keenan, supra, 46 Cal.3d at pp. 503-504.) The Chapman test is whether we can determine beyond a reasonable doubt that the error did not affect the verdict. Here, defendant argues the trial court erred in instructing the jury based on CALJIC Nos. 3.01, 3.00, and 8.27, claiming the error withheld the intent to kill issue from the jury and thus required setting aside its findings and convictions of second degree murder against Clark and first degree murder against Mannix.

Defendant claims he had no intent to kill either Clark or Mannix; that he was defending himself against Clark. The jury obviously rejected that defense and convicted him of second degree murder. Implicit in the jury's verdict is a finding that defendant had the intent to kill. The jury also resolved the intent issue adversely to defendant on the first degree murder

conviction of Mannix. In addition to the instructions on the intent to kill, the court also read the instruction on aiding and abetting. Although the latter instruction contained the Beeman flaw, it informed the jury that defendant's state of mind was relevant to the aiding an abetting question. Former CALJIC No. 3.01 provides, "A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime. . . ." (Emphasis added.) The issue raised encompasses Beeman-type error, that is, whether on the whole record the court is convinced beyond a reasonable doubt that it is not reasonably possible the jury would have not found intent by the defendant to kill Mannix either as the actual killer or as an aider and abetter. Applying the Chapman standard, I would conclude the evidence in this instance compels the conclusion that the

instructional errors were harmless beyond a reasonable doubt.

Concerning the murder of Archie Mannix for which defendant was convicted of murder in the first degree, the defense was denial, putting the People to their proof. A stab wound to the heart and drowning were concurrent causes of Mannix's death. The jury verdict that, as to the murder of Mannix, the defendant was armed with but did not personally use a knife necessarily implies that, if the jury believed the defendant was the actual killer, he killed Mannix by drowning. If the jury believed defendant was not the actual killer, the verdict implies he aided and abetted his partner, McHargue, in the stabbing and/or the drowning. In either event, the evidence shows overwhelmingly defendant's intent to cause Mannix's death.

Additionally, Sidney Hall was an inmate with defendant at Butte County jail. Hall testified that

defendant admitted killing Clark (the other murder victim) after Clark had hit him over the head with a stick. McHargue and Mannix were fighting. McHargue was "getting the worst end of it," so defendant went to his aid. Defendant told Hall "that Mannix had to die because he was a witness, and that he was stabbed and drowned -- held under the water." Defendant also told Hall that a woman drove by and stopped. McHargue went to talk to her, but defendant "was too far away and he didn't think she could identify him at all." Defendant later denied to Hall any involvement in Mannix's killing.[6]

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6. William Hudspeth, another inmate at the jail with defendant, also testified for the People. He testified that defendant admitted his and McHargue's plan to rob and kill both Clark and Mannix. He also admitted to Hudspeth that he had stabbed Mannix. Hudspeth's testimony should be disregarded, however, because the jury obviously disbelieved it. The verdict of second degree murder as to Clark, as well as the acquittal of the charge of robbery as to Clark, reflects the jury's belief that there was no "plan" to rob and kill him. Further, the finding that, as to Mannix, defendant did not personally use a knife reflects the jury's belief that defendant was not the person who actually inflicted the knife wounds.

The woman who drove by and stopped was Marie Smart. She was driving by the scene and observed a truck in a ditch and two silhouettes. She stopped, with her car's headlights, which were on high beam, shining directly onto the truck. To the left side of the truck she observed two men standing. She asked if they needed any help, and they both approached the car. One of the men, later identified as McHargue, went to Smart's car window and told her they had already summoned help. (Smart was unable to identify defendant as the second man, who had approached to about two feet from the car but did not come to the window.) As she turned her car around to leave, Smart noticed a man lying on the ground, to the left side of the truck and at the location she first observed McHargue and the other man standing. The man lying on the ground was shirtless and appeared to he hurt, moving his hands up toward his stomach and back down again. As Smart was leaving the

scene, McHargue and the other man returned to their original positions, standing over the apparently disabled man on the ground and doing nothing. When Mannix's body was discovered by authorities, his torso was bare.[7]

Dr. Pierce Rooney, a forensic pathologist, testified that Mannix had suffered a nonfatal stab wound to his abdomen. Mannix had also suffered a mortal stab wound to his heart and considerable drowning, each of which was a cause of Mannix's death. Death from the type of stab wound to the heart suffered by Mannix would, in the ordinary case, occur within a few minutes if not instantaneously.

Defendant and McHargue were eventually detained for questioning. Defendant did not respond when informed that Clark and Mannix had been discovered, dead. Defendant initially denied being with

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7. Smart's testimony, coming as it did from a disinterested witness, must have been most damaging. Indeed, during deliberation, hers was the only testimony the jury requested to be read back.

them when the truck ran into the ditch. But when informed that his story did not jibe with McHargue's, defendant admitted he and McHargue were with Clark and Mannix when the truck ran into the ditch. Defendant admitted stabbing Clark after Clark had allegedly struck defendant. Defendant denied any knowledge about what happened to Mannix, stating only that when he (defendant) turned around after stabbing Clark, Mannix was already in the ditch.[8] Defendant said he and McHargue then walked back to town After giving his statement, defendant was arrested. Among the items found in defendant's possession were a watch with dried blood and dirt on it and a key ring with six keys, both of which items were identified as Mannix's. Defendant also had a wallet containing $170.5[illegible]. One week before the homicide, Mannix was observed with a

8. Defendant also told Dr. Globus, the defense psychiatrist, that he was aware Mannix had ended up dead in the ditch, but defendant denied actually killing him.

large sum of money in his wallet, including tens and hundreds. Mannix's wallet and scattered documents, but no money, were found near his body.

Applying the Chapman test, the recited evidence from the record demonstrates to me, beyond a reasonable doubt, that the Beeman error could not have affected the verdict. (See People v. Dyer, supra, 45 Cal.3d at pp. 64-65; see also People v. Garrison (Jan. 5, 1989, S004354) ___ Cal.3d ___, ___ [typed opn. pp. 33-25].)

I would affirm the judgment. (CERTIFIED FOR PUBLICATION.)

EVANS, Acting P.J.

APPENDIX K

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

FOURTEENTH AMENDMENT

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX L

CONSTITUTION OF
THE STATE OF CALIFORNIA

ARTICLE VI, SECTION 13

"No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

APPENDIX M

CALIFORNIA PENAL CODE

SECTION 31

"**Who are principals.** All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed." [Enacted 1872.]

SECTION 187

"**Murder defined**. (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

"(b) This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:

"(1) The act compiled with the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code.

"(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although

not medically certain, would be substantially certain or more likely than not.

"(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

"(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law." [As amended by Stats. 1970, ch. 1311, § 1.]

SECTION 189

"[**Degrees of murder.**] All murder which is perpetrated by means of a destructive device or explosive, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

"As used in this section "destructive device" shall mean any destructive device as defined in Section 12301, and "explosive" shall mean any explosive as defined in Section 12000 of the Health and Safety Code."
[As amended by Stats. 1970, ch. 771, § 3.]

SECTION 190.2, SUBDIVISIONS (a)(3) and ()(17)(i)

"[**Mandatory penalty upon special findings.**] (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true

"(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

"(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies

"(i) Robbery in violation of Section 211."
(Subdivisions (a) 1, 2, 4-16, (17)(ii-ix), 18, 19 and (b) have been omitted.) [As adopted by initiative November 7, 1978.]

SECTION 211

"**Robbery defined**. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."
[Enacted 1872]

SECTION 12022, SUBDIVISION (b)

"(b) Any person who personally uses a deadly or dangerous weapon in the commission or attempted commission of a felony shall, upon conviction of such felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he has been convicted, be punished by an additional term of one year, unless use of a deadly or dangerous weapon is an element of the offense of which he was convicted."
[As amended by Stats. 1977, ch. 165, § 91, effective June 29, 1977.]

APPENDIX N

CALIFORNIA JURY INSTRUCTIONS -
CRIMINAL (CALJIC)

(Written instructions as given in this case with brackets, deletions, corrections, etc., omitted.)

2.01 (CT 801)

"However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proven circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

"Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

"Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.

"If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable."

/s/
Judge of the Superior Court

2.02 (CT 794)

"The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. But you may not find the defendant guilty of the offense charged in Counts I, II, III and IV, unless the proved circumstances not only are consistent with the theory that he had the required specific intent or mental state but cannot be reconciled with any other rational conclusion.

"Also, if the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, it is your duty to adopt that interpretation which points to the absence of the specific intent or mental state. If, on the other hand, one interpretation of the evidence as to such specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable."

/s/

3.00 (CT 824)

"The person concerned in the commission or attempted commission of a crime who are regarded by law as principals in the crime thus committed or attempted and equally guilty thereof include:

"1. Those who directly and actively commit or attempt to commit the act constituting the crime, or

"2. Those who, with knowledge of the unlawful purpose of the person who directly and actively commits or attempts to commit the crime, aid and abet in its commission or attempted commission.

"One who aids and abets is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged.

"If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his state of intoxication in determining if defendant had such knowledge.

"If from all the evidence you have a reasonable doubt whether defendant had such knowledge by reason of a state of intoxication, you must give the defendant the benefit of that doubt and find that he did not have such knowledge."

/s/
Judge

3.01 (CT 826)

"A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime.

"Mere presence at the scene of the crime which does act itself assist the commission of the crime does not amount to aiding and abetting.

"Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

/s/
Judge of the Superior Court

3.31 (CT 828)

"In each of the crimes charged in Counts I, II, III, and IV, of the information, namely, murder and robbery there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator and unless such specific intent exists the crime to which it relates is not committed.

"The specific intent required is included in the definitions of the crimes charged."

/s/

3.34 (CT 829)

"The intent with which an act is done is shown as follows:

"By the circumstances attending the act, the manner in which it is done, the means used, and the soundness of mind and discretion of the person committing the act."

/s/
Judge of the Superior Court

5.30 (CT 838)

It is lawful for a person who is being" assaulted to defend himself from attack if, as a reasonable person, he has grounds for believing and does believe that bodily injury is about to the inflicted upon him. In doing so he may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent."

/s/
Judge of the Superior Court

8.21 (CT 851)

"The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the commission of or attempt to commit the crime of robbery, and where there was in the mind of the perpetrator of the specific intent to commit such crime, is murder of the first degree.

"The specific intent to commit robbery and the commission or attempt to commit such crime must be proved beyond a reasonable doubt."

s/
Judge of the Superior Court

8.27 (CT 853)

"If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all persons who either directly and actively commit the act constituting such crime or who with knowledge of the unlawful purpose of the perpetrator of the crime aid, promote, encourage, or instigate by act or advice whether the killing is intentional, unintentional, or accidental."

s/
Judge of the Superior Court

8.77 (CT 872-873)

"If you find from the evidenc that at the time the alleged crime was committed,the d fendant had substantially reduced mental capacity, wheth r caused by mental illness, mental defect, if any, thi diminished capacity had on the defendant's ability to orm any of the specific mental states that are essentia elements of murder and voluntary manslaughter.

"Thus, if you find that the defendant's mental capacity was diminished to the ex nt that you have a reasonable doubt whether he did, aturely and meaningfully, premeditate, deliberate, anc to kill, you cannot find him guilty of a wilful, d berate and premeditated murder of the first degree.

"Also, if you find that th defendant's mental capacity was diminished to the ex nt that you have a reasonable doubt whether he was ble to form the mental states constituting either expr s or implied malice aforethought, you cannot find m guilty of murder of either the first or second degre

"If you have a reasonab doubt (1) whether he was able to form an intention unlawfully to kill a human being, or (2) whether he was aware of the duty imposed on him not to commit acts which involve the risk of grave injury or death, or (3) whether he did act despite that awareness, you cannot find that he harbored express malice.

"Further, if you have reason le doubt (1) whether his acts were done for a ba , anti-social purpose, or (2) whether he was aware of the duty imposed on him not to commit acts whi involve the risk of grave injury or death, or (3) whe r he did act despite that awareness, you cannot find th he harbored implied malice.

"Furthermore, if you find th as a result of mental illness, mental defect, or intoxicat n, his mental capacity was diminished to the extent t t he neither harbored malice aforethought nor had an tent to kill at the time the alleged crime was committ , you cannot find him guilty of either murder or voluntary manslaughter."

/s/

8.79 (CT 874)

"Before the defendant may be found guilty of the unlawful killing of a human being as a result of the commission or attempt to commit the crime of robbery, you must take all the evidence into consideration and determine therefrom if, at the time of the commission or attempt to commit such crime, the defendant was suffering from some abnormal mental or physical condition, intent to commit such crime.

"If from all the evidence you have a reasonable doubt whether the defendant was capable of forming such specific intent, you must give the defendant the benefit of that doubt and find that he did not have such specific intent."

/s/

8.80 (CT 875-876)

"If you find the defendant in this case guilty of murder of the first degree, you must then determine if murder was committed under one or more of the following special circumstances: in the commission of a robbery and/or the defendant was convicted in this case of more than one offense of murder in the first or second degree.

"A special circumstance must be proved beyond a reasonable doubt.

"If you have a reasonable doubt as to whether a special circumstance is true, it is your duty to find that it is not true.

"If defendant Kenneth Duane Roy, was not the actual killer, it must be proved beyond a reasonable doubt that he intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer in the commission of the murder in the first degree before you are permitted to find the alleged special circumstance of that first degree murder to be true as to defendant, Kenneth Duane Roy.

"You must decide separately each special circumstance charged in this case. If you cannot agree upon your finding as to all of the special circumstances but can agree as to one or more of them, you must make your finding as to the one or more upon which you do agree.

"In order to find the special circumstance charged in this case to be true or untrue, you must agree unanimously.

"You will include in your verdict on a form that will be supplied your finding as to whether the special circumstance is or is not true."

/s/

8.81.17 (CT 878)

"To find that the special circumstance, referred to in these instructions as murder in the commission of robbery, is true, it must be proved:

"1a. That the murder was committed while the defendant was engaged in or was an accomplice in the commission of a robbery.

"2. That the murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the attempted robbery was merely incidental to the commission of the murder."

/s/
Judge of the Superior Court

8.83 (CT 879)

"You are not permitted to find the special circumstances charged in this case to be true based on circumstantial evidence unless the proved facts are not only (1) consistent with the theory that the special circumstances are true, but (2) cannot be reconciled with any other rational conclusion. Each fact which is essential to complete a set of facts necessary to establish the truth of the special circumstances must be proved beyond a reasonable doubt.

"Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the truth of the special circumstances and the other to their untruth, it is your duty to adopt the interpretation which points to their untruth, and reject the interpretation which points to their truth. If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable."

/s/
Judge of the Superior Court

8.83.1 (CT 880)

"The mental state with which an act is done may be manifested by the facts surrounding its commission. You may not find the special circumstances charged in this case to be true unless the proved facts not only are consistent with the theory that the defendant had the required mental state but cannot be reconciled with any other rational conclusion.

"Also, if the evidence as to the required mental state is susceptible of two reasonable interpretations, one of which points to the existence thereof and the other to the absence thereof, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the required mental state appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable."

/s/
Judge of the Superior Court

17.16 (CT 896)

"It is charged in Counts 1, 2, 3, and 4, that in the commission of the crime therein described, the defendant Kenneth Duane Roy personally used a deadly or dangerous weapon.

"A deadly or dangerous weapon means any weapon, instrument or object that is capable of being used to inflict great bodily injury or death.

"The term 'used a deadly or dangerous weapon,' as used in this instruction, means to display such a weapon in an intentionally menacing manner or intentionally to strike or hit a human being with it.

"If you find such defendant guilty of the crime thus charged, it then will be your duty to determine whether or not such defendant personally used a deadly or dangerous weapon in the commission of such crime.

"Such defendant may be found to have personally used a deadly or dangerous weapon at the time of the commission of the crime charged only if the proof shows beyond a reasonable doubt that such defendant personally used such a weapon at such time.

"You will include a finding on that question in your verdict, using a form that will be supplied for that purpose."

/s/
Judge of the Superior Court

"The written instructions now being given you will be made available in the jury room during your deliberations if you so request. They must not be defaced in any way.

"You will find that the instructions may be either printed, typewritten or handwritten. Some of the printed or typewritten instructions may be modified by typing or handwriting. Blanks in the printed instructions may be filled in by typing or handwriting. Also, portions of printed or typewritten instructions may have been deleted by lining out.

"You are not to be concerned with the reasons for any modifications that have been made. Also, you must disregard any deleted part of an instruction and not speculate either what it was or what is the reason for its deletion.

"Every part of an instruction whether it is printed, typed or handwritten is of equal importance. You are to be governed only by the instruction in its final wording whether printed, typed or handwritten."

/s/
Judge of the Superior Court

APPENDIX O

DECLARATION OF B.D. CHASTAIN

I, BARBARA DAWN CHASTAIN, declare as follows:

1. I am a Correctional Case Records Supervisor for the California Department of Corrections at the California State Prison at Folsom, Represa, California. I have been employed in this capacity since March 1988.

2. In my capacity as a Correctional Case Records Supervisor I am responsible for the supervision of staff which calculate release dates and conduct audits on inmate files within this facility.

3. The Second Amended Abstract of Judgment dated December 26, 1990, Butte County case number 76386, is the judgment under which Kenneth Duane Roy is currently incarcerated by the California Department of Corrections. However, based on the Department's calculations, the credits shown on the Abstract of Judgment are incorrect since those credits were previously applied at the time of the original sentencing (see attached letter dated 1-22-90 from this Department to Butte County Superior Court.)

I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct.

DATED: 7-5-91 /s/
BARBARA DAWN CHASTAIN

FOI

ABSTRACT OF JUDGMENT – PRISON COMMITMENT

FORM DSL 290

SUPERIOR COURT OF CALIFORNIA, COUNTY OF BUTTE
BRANCH

04100

PEOPLE OF THE STATE OF CALIFORNIA versus
DEFENDANT: KENNETH DUANE BOY
AKA:

CASE NUMBER(S): 74386

COMMITMENT TO STATE PRISON
ABSTRACT OF JUDGMENT

AMENDED ABSTRACT: 2nd

FILED
DEC 26 1990
CANDACE J. GRUBBS, Butte Co. Clerk
By K. Nichols, Deputy

08/27/90	2	LOYD H. MULKEY, JR.	K. Nichols
I. Miller	H. Harberts	J. Kenkel	T. Brown –

1. ADDITIONAL COUNTS ARE LISTED ON ATTACHMENT: 1

COUNT	CODE	SECTION NUMBER	CRIME																
A	PC	211	Robbery	81	11	08	83	XX			U							5	

[redacted]

[redacted]

[redacted]

852   436   2001

CLERK OF THE COURT

K. Nichols   DATE: 12-26-90

ABSTRACT OF JUDGMENT – PRISON COMMITMENT
FORM DSL 290

THIS IS A CERTIFIED
COPY OF DOCUMENT IN FILE
BDChastain
Prison Case Records Officer

2.

REPORT – INDETERMINATE SENTENCE,
or OTHER SENTENCE CHOICE

FILED

DEC 26 1990

CANDACE J. GRUNDY, Butte Co. Clerk

By _____ Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF BUTTE

0,4,1,0,0

PEOPLE OF THE STATE OF CALIFORNIA

DEFENDANT: KENNETH DUANE ROY

AKA:

CASE NUMBER: 75,384

REPORT ON:
- ☐ DEATH SENTENCE
- ☒ INDETERMINATE SENTENCE
- ☐ OTHER SENTENCE CHOICE

AMENDED REPORT ☐

DATE OF HEARING: 12/27/90 | DEPT. NO. 2 | JUDGE: LOYD H. MURRAY, JR. | CLERK: K. Nichols

REPORTER: J. Miller | PROBATION OFFICER: M. Hachenda | DISTRICT ATTORNEY: J. Kanka | ATTORNEY FOR DEFENDANT: [illegible]

1. ☐ [illegible]

Count	Code	Section Number	Crime	Time (Yrs)	Min	Max	Consecutive	Stayed
1	PC	187	2nd Degree Murder	[illegible]				
2	PC	187	1st Degree Murder	[illegible]				

[redacted]

3. [redacted]

4. ☐ [illegible]

5. ☒ [illegible]

A. ☒ For LIFE, a term of [illegible] in the STATE PRISON for the COMMUNITY OF PAROLE to run as to count(s) 1 and 2

B. ☐ For LIFE without the possibility of parole as to count(s) _____

C. ☐ For other term prescribed by law as to count(s) _____

6. ☐ Count _____ [illegible]

7. ☐ [illegible]

A. ☐ [illegible]

B. ☐ [illegible]

8. ☐ [illegible]

A. ☐ [illegible]

B. ☐ [illegible]

9. ☐ [illegible]

A. ☐ [illegible]

B. ☐ [illegible]

C. ☐ [illegible]

D. ☐ [illegible]

NOTE 1: PURSUANT TO ARTICLE VI, SECTION 6 OF THE CALIFORNIA CONSTITUTION, AND SECTION 1237 OF THE GOVERNMENT CODE, THIS COURT MUST REQUIRE THAT EACH SUPERIOR COURT SHALL DESIGNATE THREE ITEMS FOR EACH INDETERMINATE SENTENCE TO STATE PRISON OR DIFFERENT CHOICE ISSUED THAT STATE PRISON.

NOTE 2: THE ABOVE SENTENCE OR INDETERMINATE SENTENCE, WHICHEVER IS APPLICABLE, MUST ALSO BE PREPARED, IF A NEW TRIAL IS GRANTED, IN THE ORIGINAL OFFICE OF THE COUNTY CLERK.

NOTE 3: IF DEFENDANT IS CONVICTED OF A CRIME [illegible], THIS REPORT, [illegible], MUST BE PREPARED AND SENT TO [illegible] AS WELL AS THE [illegible] AS REQUIRED BY SECTION 1203 OF THE PENAL CODE.

DATE: 12-26-90

REPORT – INDETERMINATE SENTENCE
FORM CR 251

THIS IS A CERTIFIED COPY OF DOCUMENT ON FILE

B.D. Chastain

Deputy Clerk/Officer

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